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IROQUOIS CONFEDERACY OF NATIONS

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. Con. Res. 76

TO ACKNOWLEDGE THE CONTRIBUTION OF THE IROQUOIS CONFEDERACY OF NATIONS TO THE DEVELOPMENT OF THE U.S. CONSTITUTION AND TO REAFFIRM THE CONTINUING GOVERNMENT-TO-GOVERNMENT RELATIONSHIP BETWEEN INDIAN TRIBES AND THE UNITED STATES ESTABLISHED IN THE CONSTITUTION

DECEMBER 2, 1987
WASHINGTON, DC

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S. CON. RES. 76

WEDNESDAY, DECEMBER 2, 1987

U.S. Senate,
Select Committee on Indian Affairs,
Washington, DC.

The committee met, pursuant to notice, at 9:09 a.m., in room 485, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, SELECT COMMITTEE ON INDIAN AFFAIRS

The Chairman. The committee will come to order.

This morning, the select committee will consider S. Con. Res. 76, a resolution to acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States as established in the constitution.

This year has seen the beginning of numerous activities in celebration of the bicentennial of the United States Constitution. A number of Indian leaders believed that it was also an appropriate time to reexamine the history of the constitution, particularly in terms of acknowledging the contributions of the Iroquois Confederacy of Nations in its formulation and to clarify the status of Indian tribes in relation to the United States.

Over the years, the Federal-Indian relationship has become a quagmire of confusion and misunderstanding subjected to the whims of each Administration. Our government's role has been marked by paternalism, conflicts of interest, and mismanagement on the part of the bureaucracy charged with administering the lands and other assets of Indian tribes and individual Indians.

Educational and legal scholars, in conjunction with Indian tribes and Indian leaders, have been researching the historical origins of the United States Constitution and the interpretation of key provisions of the Constitution that speak to the way in which Indian tribes and the United States relate to one another. There now appears to be a strong consensus emerging among Indian tribes that the United States has strayed from the original intent of the framers of the Constitution and their vision of the relationship between the U.S. and the tribes.

This morning's impressive agenda of witnesses will address these issues and hopefully enlighten us, from their perspectives, as to what must be undertaken by the Congress if we are to preserve the original intent of the framers of the Constitution and keep faith with this government's historical commitment to the Indians.

As some of you are aware, the Select Committee on Indian Affairs has recently established a Special Committee on Investigations to examine the problems associated with the administration of Indian affairs and Indian programs. This special committee will begin operating in the very near future, and it is my belief that S. Con. Res. 76 will be enhanced by the work to be undertaken by this Special Committee on Investigations.

[The text of S. Con. Res. 76 follows:]

100TH CONGRESS
1ST SESSION

S. CON. RES. 76

To acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 16, 1987

Mr. INOUYE (for himself, Mr. EVANS, Mr. DECONCINI, Mr. BURDICK, Mr. MCCAIN, Mr. ADAMS, Mr. BOREN, Mr. CONRAD, Mr. CRANSTON, Mr. D'AMATO, Mr. DOLE, Mr. FORD, Mr. FOWLER, Mr. LEVIN, Mr. PELL, Mr. PRYOR, Mr. REID, Mr. RIEGLE, and Mr. STAFFORD) submitted the following concurrent resolution; which was referred to the Select Committee on Indian Affairs

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CONCURRENT RESOLUTION

To acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.

Whereas the original framers of the Constitution, including most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts, principles and governmental practices of the Six Nations of the Iroquois Confederacy; and, Whereas the confederation of the original Thirteen Colonies into one republic was explicitly modeled upon the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself; and,

Whereas since the formation of the United States, the Congress has recognized the sovereign status of Indian tribes, and has, through the exercise of powers reserved to the Federal Government in the Commerce Clause of the Constitution (art. I, s8, cl.3), dealt with Indian tribes on a government-to-government basis and has, through the treaty clause (art. II, s2, cl.2) entered into three hundred and seventy treaties with Indian tribal nations; and,

Whereas from the first treaty entered into with an Indian nation, the treaty with the Delaware Indians of September 17, 1778, and thereafter in every Indian treaty until the cessation of treatymaking in 1871, the Congress has assumed a trust responsibility and obligation to Indian tribes and their members to "exercise the utmost good faith in dealings with the Indians" as provided for in the Northwest Ordinance of 1787, (1 Stat. 50); and,

Whereas Congress has consistently reaffirmed these fundamental policies over the past two hundred years through legislation specifically designed to honor this special relationship; and,

Whereas, the judicial system of the United States has consistently recognized and reaffirmed this special relationship: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That—

(1) the Congress, on the occasion of the two hundredth anniversary of the signing of the United States

Constitution, acknowledges the historical debt which this Republic of the United States of America owes to the Iroquois Confederacy and other Indian nations for their demonstration of enlightened, democratic principles of Government and their example of a free association of independent Indian nations;

(2) the Congress also hereby reaffirms the constitutionally recognized government-to-government relationship with Indian tribes which has historically been the cornerstone of this Nation's official Indian policy;

(3) the Congress specifically acknowledges and reaffirms the trust responsibility and obligation of the United States Government to Indian tribes, including Alaska Natives, for their preservation, protection and enhancement, including the provision of health, education, social and economic assistance programs as necessary, to assist tribes to perform their governmental responsibility to provide for the social and economic well-being of their members and to preserve tribal cultural identity and heritage; and

(4) the Congress also acknowledges the need to exercise the utmost good faith in upholding its treaties with the various tribes, as the tribes understood them to be, and the duty of a great Nation to uphold its legal and moral obligations for the benefit of all of its

citizens so that they and their posterity may also continue to enjoy the rights they have enshrined in the United States Constitution for time immemorial.

○

The CHAIRMAN. Our first witness this morning is the Honorable Oren Lyons, Chief of the Onondaga Nation of New York. He will be accompanied by Dr. Gregory Schaaf. We also have Dr. Vine Deloria, professor at the University of Arizona; Dr. Donald Grinde, professor, California Polytechnic College Institute of California; and Ms. Arlinda Locklear of Knoxville, MD.

Ladies and gentlemen, will you step forward, and may I now call upon our dear friend, Chief Lyons.

STATEMENT OF HON. OREN LYONS, CHIEF, ONONDAGA NATION, NEDROW, NY, ACCOMPANIED BY GREGORY SCHAAF, ETHNOHISTORIAN, SIX NATIONS OF THE IROQUOIS CONFEDERACY

Mr. LYONS. Thank you, Senator Inouye.

Again, it is an honor and a pleasure to address the Senate Select Committee on Indian Affairs concerning S. Con. Res. 76 in recognition to the Iroquois Confederacy contributions to the Constitution of the United States.

I have titled this discussion "The Land of the Free and the Home of the Brave" and I am going to discuss the early history prior to the coming of the white man on this continent which receives little attention in the history of this country, but it was in these early times that the development of democratic processes came about on this land, and I would like to give you our history—a very short history, of course—but it will deal with those times. So, I shall begin.

Upon the continent of North America prior to the landfall of the first white man, a great league of peace was formed, the inspiration of a prophet called The Peacemaker. He was a spiritual being, fulfilling the mission of organizing warring nations into a confederation under the great law of peace.

The principles of this law are: peace, equity and justice, and the power of the good minds.

With the help and support of a like-minded man called Hayenwatah whom some people now call Hiawatha, an Onondaga by birth and a Mohawk by adoption, he set about the great work of establishing a union of peace under the immutable natural laws of the universe.

He came to our lands in our darkest hour when the good message of how to live had been cast aside and naked power ruled, fueled by vengeance and blood lust. A great war of attrition engulfed the lands, and women and children cowered in fear of their own men. The leaders were fierce and merciless. They were fighting in blind rage. Nations, homes, and families were destroyed, and the people were scattered. It was a dismal world of dark disasters where there seemed to be no hope. It was a raging proof of what inhumanity man is capable of when the laws and principles of life are thrown away.

The Peacemaker came to our lands, bringing the message of peace, supported by Hiyenwatah. He began the great work of healing the twisted minds of men.

This is a long history, too long to recount today in this forum. Suffice it to say its a great epic that culminated on the shores of the lake now called Onondaga where, after many years of hard work—some say perhaps even 100 years—he gathered the leaders who had now become transformed into rational human beings into a grand council, and he began the instructions of how a great league of peace would work.

He set up the families into the clans, and then he set up the leaders of the clans. He established that the league of peace would be matriarchal and that each clan would have a clan mother. Thus, he established in law the equal rights of women.

He raised the leaders of each clan, two men, one the principal leader and the second his partner. They worked together for the good of the people. He called these two men Hoyanah or the good minds, the peacemakers, and they were to represent their clans in council. Thus, he established the principle of representation of people in government.

Henceforth, he said, these men will be chosen by the clan mother, freely using her insight and wisdom. Her choice must first be ratified by the consensus of the clan. If they agree, then her choice must be ratified by full consensus of the chiefs council of their nation. Then her choice must be ratified and given over to the council of chiefs who then call the grand council of the great league of peace, and they will gather at the nation that is raising this leader, and they would work together in ceremony.

He made two houses in each nation. One he called the Long House and the other he called the Mud House. They would work together in ceremony and council, establishing the inner source of vitality and dynamics necessary for community.

He made two houses in the grand council, one called the Younger Brothers consisting of the Oneida and the Cayuga Nations and later enlarging to include the Tuscarora. The other was the Elder Brothers, consisting of the Mohawks with the title Keepers of the Eastern Door, the Onondaga whom he made the Firekeepers, and the Senecas who were the Keepers of the Western Door. Now, he made the house, and the rafters of the house were the laws that he laid down, and he called us Haudenosaunee, the people of the Long House.

Now, the candidate for the clan title is brought before the grand council and will be judged on his merits, and they have the right of veto. If they agree, then he may take his place in grand council. But before that, he is turned back to the people, and they are asked if they know a reason why this man should not be a leader and hold title. Thus, the process is full circle back to the people.

Thus, the Peacemaker established the process of raising leaders for governance, and, by this process, a leader cannot be self-proclaimed. He is given his title and his duties, and his authority is derived from the people, and the people have the right to remove him for malfeasance of office.

He established the power of recall in the clan mother, and it is her duty to speak to him if he is receiving complaints from the people concerning his conduct. The clan mother shall speak to him three times, giving sufficient time between warnings for him to change his ways. She shall have a witness each time. The first will be her niece, in other words, a woman. The second shall be the partner of the chief in council or the principal leader, as the case may be. And the third and final warning comes with a man who holds no title, and he is coming for the chief's wampum and for the chief's emblem of authority, the antlers of a deer.

Thus, he established the power or recall vested in the people.

The leader must be free from any crime against a woman or child. He cannot have killed anybody and cannot have blood on his hands. He must believe in the ways of the Long House. His heart must yearn for the welfare of the people. He must have great compassion for his people.

He must have great tolerance, and his skin must be seven spans thick to withstand the accusations, slander, and insults of the people as he goes about his duties for the people. He has no authority but what the people give him in respect. He has no force of arms to demand the people obey his orders. He shall lead by example, and his family shall not influence his judgment. He carries his title for life or until he is relieved of it by his bad conduct or ill health. He now belongs to the people.

At the first council, there were 50 original leaders, and their names became offices to be filled by each succeeding generation. So, it continues up to this very day. The Great Peacemaker had established a government of absolute democracy, the constitution of the great law intertwined with the spiritual law.

We then became a nation of laws. The people came of their own free will to participate in the decision making of the national council and the grand council. Thus, he instilled in the nations the inherent rights of the individual with the process to protect and exercise these rights.

Sovereignty then began with the individual, and all people were recognized to be free, from the very youngest to the eldest. It was recognized and provided for in the great law of peace that the liberty and equality demanded great moral fortitude, and it was the nature of the free man to defend freedom.

Thus, freedom begat freedom, and great societies of peace prevailed, guided by the leaders, the good minds. The men were restrained by moral conduct, and the family with the woman at its heart was the center of Indian societies and nations.

Now, the Great Peacemaker said the symbol of the Haudenosaunee shall be the great white pine with four white roots of truth extending to the four cardinal directions, and those people who have no place to go shall follow these roots back to the tree and seek shelter under the long leaves of the white pine that we shall call the great tree of peace. I shall place an eagle atop the tree to be ever vigilant against those who would harm this tree, and the eagle shall scream his warnings to our chiefs whose duty is to nurture and protect this tree.

Now that this is done, the chiefs, clan mothers, and faith keepers being raised and the great law being firmly established in place, he said, I now uproot this tree and command you to throw all of your weapons of war into this chasm to be carried by the undercurrents of water to the furthest depths of the earth, and now I place this tree back over this chasm, throwing away forever war between us, and peace shall prevail.

This is what prevailed upon this great Turtle Island at the first landfall of the white man. He found here in full flower free nations guided by democratic principles, all under the authority of the natural law, the ultimate spiritual law of the universe. This was then the land of the free and the home of the brave.

Sovereigns and sovereignty as understood by the Europeans related to the power of kings and queens, of royalty to rule men as they saw fit, to enslave human beings and control in total the lives and property of their subjects. Strange indeed it must have been for these immigrants to find a land with nothing but free people and free nations. The impact has reverberated down through history to this time. As Felix Cohen put it, "the Indian people had 'Americanized' the white man."

The first treaty between the Indians and the white man took place at Skanect Dah De, the place where the pines begin—it is now called Albany, New York—in 1613 or thereabout. It was a treaty that was the grandfather of all treaties, and it was called the Guswenta or the two row wampum.

That treaty established our equal rights in this land and our separate and equal coexistence on this land between our two peoples, the canoe of the Indian and the boat of the white man going down the river of life in peace and friendship forever. The last three principles were memorialized in the great silver covenant chain with the three binding us together forever, peace and friendship forever. As long as the grass grows green, as long as the water runs down hill, and as long as the sun rises in the east and sets in the west shall we hold this treaty. This is where those original words come from.

It is this treaty that I brought today. It is this belt that I speak of. This is our canoe, the Indian people, their government, and their religions. This is our brother the white man's boat, his religions, his government, and his people. Together, side by side, we go down the river of life in peace and friendship and mutual coexistence.

As you note, we never come together. We are equal.

Benjamin Franklin observed these differences in government and remarked:

> The care and labor of providing for artificial and fashionable wants, the sight of so many rich wallowing in superfluous plenty, whereby so many are kept poor and distressed for want, the insolence of office, and the restraints of custom all contrive to disgust the Indians with what we call civil society.

These remarks he made in 1770.

So, we now come to the process of this transference of democratic ideas and ideals from the Indian to the white man. It was a process of associations, of years of meetings, discussions, wars, and peace. Treaties became a process of relationships. Early America was steeped in Indian lore and social and political associations.

There were longstanding interrelationships between the colonies and the Indian nations that surrounded them. It was our grandfathers who took your grandfathers by the hand and urged them to form a union such as ours so that they may prosper at the Treaty of Lancaster in 1744, and it was Benjamin Franklin who took notes at that treaty and became inspired to such a union.

It was your grandfathers who said to our chiefs at German Flats in 1775 that they would now take our advice and form such a union and plant a tree of peace in Philadelphia where all could seek shelter.

Finally, it was our chiefs and leaders who first acknowledged you as a new and separate nation, independent and free, with these words:

> Brothers, the whole six nations take this opportunity to thank you that you have acquainted us with your determination in so public a manner, and we shall for the future consider you as thirteen independent states.

And they gave a white belt, a row of wampum, to commemorate this great occasion. This recognition was stated Friday, August 9, 1776 at German Flats Treaty.

This was the culmination of the long history and association with the Haudenosaunee and the immigrants who became Americans. Your people went on to develop the Constitution of the United States encompassing the symbols of our constitution, the bundle of arrows symbolizing the new thirteen states, the leaves of the pine tree, and the eagle that we placed upon the tree of peace.

This and more we share as common history. Brothers, we now turn our faces toward the future and continue to wish you well in your endeavors as a nation. Perhaps it would be well for you to look back again at our principles of peace, justice, and equality, to grasp firmly our hand in recognition of our long association and heed the treaties that were made so long ago that these treaties may continue to thrive for our posterity as we continue down the long journey to eternity and we continue our association as government to government.

With that statement, I close the statement from the Haudenosaunee, and I thank you very much for your kind attention.

The CHAIRMAN. Thank you very much, Chief Lyons.

Dr. Schaaf, do you have anything to add?

Mr. SCHAAF. Yes; Senator Inouye.

I would like to thank you very much for inviting us here today. I am a young historian, and I have dedicated myself to studying the roots of democracy and the history of this land.

I must say that I was very impressed at the end of the Iran-Contra hearings when you gave your concluding remarks, Senator, when you said that much as the Constitutional Convention was presented with different views of the relationship of government and its citizens of 200 years ago, it is our form of government which is what gives us our strength. I think you were absolutely right. It is our form of government which gives us our strength.

As an historian, I have been searching back for the roots of that form of government. What are the origins of democracy within this land? What are the roots of democracy on Earth?

As I have traced through the historical records, I have found that those roots trace back to where this gentleman on my right, Chief Oren Lyons, comes from—from the Haudenosaunee, the Iroquois Confederacy.

I began researching the history of the confederacy and the relationship to the United States Government 11 years ago when I uncovered a collection of original unpublished documents called the Morgan Papers. They included previously unknown letters written by George Washington, Thomas Jefferson, John Hancock, papers related to Benjamin Franklin, Patrick Henry, and also the private journal of George Morgan who was one of the first Indian agents for the Continental Congress and helped to negotiate the first U.S.-Indian peace treaty in 1776.

I used to keep a time log of my research into this topic which is before this committee today. A few years ago, I got up to 10,000 hours and I just quit counting.

The evidence is overwhelming. I swear to you, my leader, I swear to the American people, I swear to the people from all around the world that the evidence to support S. Con. Res. 76 is overwhelming.

I have presented about 75 pages of written testimony, but we could have presented thousands and thousands of pages.

On April 19, 1776, John Hancock and Congress appointed George Morgan to be their Indian agent. They told him at that time that you are required to provide that a great peace belt, a peace belt with 13 diamonds and 2500 wampum beads be delivered to the leaders of the western Indian nations. Our ancestors took that peace belt and delivered it to Chief Oren Lyons' ancestors. There was a duplicate belt which was also delivered to the Lenni Lenape or Delaware Nation who are the grandfathers of the Algonquin family of nations.

At that time, the Iroquois and Algonquin peoples and the other Indian nations of this land truly held a balance of power within their hands. If they at that crucial juncture in time as the birth of America was about to emerge had joined the British and attacked from the west as the British attacked from the east, the revolution clearly could have been crushed, and these United States of America might not have been created as we enjoy our rights and liberties under the constitution today.

Just before the founding fathers were about to make their declaration of independence, a delegation of his ancestors came before Congress. They came there to recognize the United States that was about to be born. They also were opening diplomatic relations between the revolutionary government and their own government.

John Hancock and the Members of Congress were so impressed by the ideas of democracy as expressed by these chiefs that I would like to share with you what John Hancock said on that day in 1776. He began by addressing his ancestors as brothers, because the original relationship between the United States Government and the Indian nations was a brother to brother relationship, a shoulder to shoulder relationship.

And John Hancock said to the Iroquois ambassadors, "We hope the friendship that is between us and you will be firm and continue as long as the sun shall shine and the waters run, that we and you may be as one people and have but one heart and be kind to one another like brethren."

When George Morgan, being the Indian agent representing the United States, addressed the Indian nations, he said to them:

> Brothers, we are not only inclined to do you justice in all things, but we wish to promote your happiness and to render you every service in our power if you tell us what you want. We therefore desire you to be wise and that your wise people will consider this matter well, for we wish to see you a happy people and to live with you in friendship forever. Speak your minds free when you come to the treaty that we may understand you.

I think that the freedom of speech is something that is fundamental to our society. It is one of the things that makes us great as a people.

The Onondaga ambassadors conveyed to John Hancock an Indian name. They called him Karandawan which, roughly translated, means "The Great Tree of Liberty." The tree of peace which Chief Lyons so eloquently described under which the Great Peacemaker inspired the warriors to bury their weapons which may be the oldest historical evidence of an effort for disarmament in the history of the world and then placed atop of it this sacred tree of peace—that tree of peace became a symbol for the American revolutionaries and became the tree of liberty.

Atop that tree is the eagle, and as we look at the flag of these United States of America that is to your right, Senator, top of it we see that eagle. Before you there is a wooden carving, and it shows the eagle which is part of our national symbol. Within his talons is an olive branch which symbolizes the tree as a symbol of peace.

Also in his talons are these arrows, and part of what the Peacemaker did was he said that each nation represented like an arrow, and one arrow standing alone might be broken easily, but he bound the five nations together, the five arrows.

That was something that was impressed upon our founding fathers. So, when they were designing our national emblem, they took this model from the Haudenosaunee. That is why in this wooden emblem which is before you we see these arrows which are bound in the eagle's talons.

At the very first Indian-U.S. peace treaty in 1776, there were certain promises that were made to the Indian nations. Our government promised their governments that we would always respect their land rights. We promised that we would respect their right to justice.

We also promised that their young men would never have to fight in our wars unless they volunteered to do so. Many of them have done so. There were Indian people who fought in the Revolutionary War, in the War of 1812, in the Civil War, as well as World War I and World War II, Korea, and Viet Nam. They have fought to defend this land. Also, they should, I believe, have retained that right to serve as they wish.

I think also that the treaties themselves, what is the constitution? To me, the Constitution of the United States is like a treaty between we the people and our government. I think that the Senate resolution is so important to be passed because I think it will give a message to the world that we of the United States Government really honor our treaties, our treaties with the Indian nations, our treaties with our allies, and also the treaty that we are about to sign with the Soviet Union.

I think that S. Con. Res. 76 is kind of a model of understanding. I think, too, as I have looked into the U.S. Constitution and compared it with the Iroquois Great Law of Peace, one of the things that we did was we took the U.S. Constitution and we placed it in one column. Then, side by side, we selected appropriate clauses from the Iroquois Great Law of Peace.

I was absolutely astounded, Senator, by the similarities between the documents, the separation of powers, the divisions of our government. The fundamental structure of the United States Government clearly was modeled on the Iroquois Grand Council.

Also, I think some of the differences were very interesting—fundamentally, the rights of women. I think that if the entire Great Law of Peace had been adopted in greater entirety within the U.S. Constitution, women within this land would not have had to wait so long to have had the right to vote. They would not have had to wait so long to have fundamental rights.

I think also that the qualifications of leadership are very important. One of the qualities of leadership within the Iroquois society is that, first and foremost, their leaders must be honest in all things.

I think that in your remarks at the recent Iran-Contra hearings, I must tell you that it really helped to reinforce my sense of patriotism, my sense of pride in America. You underscored the fundamental principles of this land.

Having researched very carefully and continuing to research—because I am a very young man—the fundamental principles of democracy, I think that it is the right of we the people to have the freedom of speech, the freedom of expression, that if we as a people express those rights and really live up to those principles, it will create a model for people all around the world.

I think also within the Constitution the commerce clause is very important, and its relationship with taxation or the exclusion of taxation towards Native people.

In conclusion, I would like to say that the Iroquois, the Haudenosaunee Grand Council is perhaps the oldest participatory democracy on earth. I spent three hours presenting the evidence before the National Indian Education Association. This is a body of over 1000 of the top Indian educators in the country.

They unanimously passed a resolution supporting S. Con. Res. 76. They also felt it was very important that the curriculum for our public school systems from kindergarten through grade 12 to the university level must now be rewritten. This history of this land must be rewritten to recognize the remarkable contributions of the original people of this land.

To symbolize that, Native peoples are planting trees as symbols of peace all across this land. They have planted trees of peace at the State Capitol in California, at the State Capitol in New York. Next September, there will be a tree of peace planted on the Mall here in Washington which I hope you may be able to attend. Perhaps there might be a tree of peace planted in your home State, in Washington, and in every State of this union and every capitol on this earth, because my grandpa told me to dream for the best but always be prepared for the least.

At the very best, perhaps the dream of the Peacemaker, a world without war, might one day come true, but at the very least, we will plant many beautiful trees upon this earth and spread the fundamental principles of democracy in this land.

Thank you very much.

[Prepared statement of Mr. Schaaf appears in the appendix.]

The CHAIRMAN. I thank you very much, Dr. Schaaf, for your eloquence.

Now, may I call upon Professor Vine Deloria of the University of Arizona.

Mr. **Deloria**. Senator, Dr. Grinde's testimony bears more on what has come up, so perhaps we could trade places.

The **Chairman**. Fine.

STATEMENT OF DONALD GRINDE, JR., PROFESSOR OF HISTORY, CALIFORNIA POLYTECHNIC STATE UNIVERSITY, SAN LUIS OBISPO, CA

Mr. **Grinde**. Senator Inouye and distinguished guests, my testimony and my research that I have done will supplement what Chief Lyons and Dr. Schaaf have been discussing.

It is indeed ironic that we are putting things in the Congressional Record today that are already recorded. My perusal of the Journals of the Continental Congress, the papers of the framers at the Constitutional Convention, clearly indicates that it is not a question of whether the Iroquois had an impact on the political ideas of this nation, but it is a question of degree. The problem has been historically, I think, a matter of visibility. Recently, I read in a series of letters between Jefferson and Adams in 1812, that they expressed dismay that young people in the Eastern U.S. no longer had a great deal of daily contact with American Indians by 1812. They were bemoaning the fact that they had lost contact with American Indian ideas and concepts.

Therefore, it is important to understand that the Iroquois provided concepts of unity to the American people long before the American Revolution. There is a clear historical record of that. Not only that, but they provided a model of freedom in a very direct way to the French as well, and that is clearly demonstrable.

There is clear evidence of Iroquois ideas in the concepts of territorial expansion and in admitting new States on an equal footing in our historical record. There are ideas about decorum and the process of Congress, that people cannot be hooted down as they were occasionally in Parliament, that people ought to respect speakers while they were debating such issues. This clearly comes from American experiences with American Indian democratic societies, treaty-making, and trade interaction.

The concept that sovereignty resides in the people, not in the Crown or some upper class oligarchy is clear as well. The abstract theories of political democracy in Europe before the American Revolution harkened back to the ancient days, and they also cited Iroquois democratic ideas. However, John Locke and others were considered to be theorists, and there is plenty of evidence that the American revolutionaries who had a great deal of contact with the Iroquois saw that Iroquios society was not a theory but a working democracy that the American people had several generations of interaction with.

Some distinguished American historians have recognized this process. Julian Boyd, the editor of the Thomas Jefferson papers, speaking of the Albany Plan of Union (the first step to the U.S. Constitution) states, "Franklin proposed a plan for the union of the colonies, and he found his materials in the Great Confederacy of the Iroquois. Here, indeed, was an example worthy of copying."

So, there is knowledge among some American historians on this topic but, there is not much general interest.

One thing I would like to add about Dr. Schaaf's testimony is that it is significant that the Iroquois are coming to Congress throughout the American Revolution. More importantly, they were coming at key times.

The Iroquois chiefs spent a month in late May and most of June 1776 in Philadelphia. During that time, the Declaration of Independence was written and the Articles of Confederation were proposed. These Articles of Confederation are a revision of the Albany Plan of Union which was adopted from the League of Iroquois.

Of course, as Congress will often do, it will be a few years before the revisions of the Articles of Confederation were completed, but the initial document that is submitted bore striking resemblance to the Albany Plan of Union which, of course, I and other American historians have established as being copied from the Great Law of the Iroquois.

There are repeated references in the Journals of the Continental Congress, to Iroquois concepts of unity. The Continental Congress referred to itself as the Grand Council Fire, not just to American Indians present at sessions, but delegates such as Robert Treat Paine of Massachusetts used such phrases when he was writing his constituents in Massachusetts in 1776.

There are recognition of a great deal of interaction. Also, there was a propaganda pamphlet (*Apocalypse de Chiokeyhekoy*) written in 1777 published by the Continental Congress in France that basically states—(this is a lengthy pamphlet of over 150 pages, and in it is an extensive detailing of an Iroquois prophecy) that the American people had assimilated Iroquois ideas and therefore, the victory of the American people will be a victory for humanity because the American people were adopting the ideas of the Iroquois.

Now, this pamphlet is striking because the Revolution is just two years old. This work is obviously propaganda aimed at the French to bring them in on the American side. When devising propaganda, you don't deal with obscure things. The French knew of the Iroquois. They were fascinated by Iroquois ideas of freedom.

Very soon, when this pamphlet was written, Franklin would go to Paris, and Benjamin Franklin will be given a hero's welcome. There were poems written about Franklin's coming, rumors that he was coming with 100 Indian men. There was a great deal of adulation of Benjamin Franklin at the time.

Once Franklin arrived, we know, that he talked incessantly about the Iroquois. Accounts by the French philosophes state that throughout his stay in France, he talked in great detail and exactness about the Iroquios, their politics, and said that their ways are preferable to the "civilized world."

Turning to the Constitutional Convention itself, Franklin wrote letters to Indians in which he termed the process of creating a new government as putting out the fire and then raking the coals and starting it again, clear evidence that he was familiar with Iroquois governmental symbology.

When the first draft of the constitution was begun on July 27, 1787, John Rutledge of South Carolina pulls out some old treaties and talked of the Iroquois notion of sovereignty residing in the people. James Wilson also pointed out that territorial expansion using the Iroquois covenant chain could be utilized in the new government.

James Wilson makes note of this in his papers and concurs with Rutledge's ideas. Other members of the Constitutional Convention, William Livingston, co-author of the New Jersey Plan, spoke fluent Mohawk he spent 1 year as a teenager with them. William Livingston was also the father-in-law of John Jay of New York.

Perhaps most striking is an editorial that appears in a Philadelphia publication—The American Museum— in August 1787 while the first draft of the Constitution was being written. In this editorial—and it was an open address to the delegates of the Constitutional Convention—the Iroquois were portrayed as fathers who called their sons around and gave them a bundle of sticks and detailed the whole imagery that Professor Schaaf went through. It concludes with saying that the members of the Constitutional Convention should create a strong union just as this careful father of old had admonished the people several generations before, and they urged them to adopt the phrase "unite or die."

A few months after the Constitutional Convention, James Wilson, one of the principal architects of the Constitution, harkens to this "unite or die" slogan. He says that in searching for a form of government that would give maximum internal freedom and yet give the external abilities of what we call national security of a monarchy, they found no such model in Europe or among any political thinkers, but he said the sentiments of the Convention and of the people of America was expressed in the motto of "unite or die."

Later, Wilson, as Justice of the Supreme Court, would use Iroquois imagery to discuss territorial expansion. He usedg the imagery of the Iroquois covenant chain that linked diverse groups into a strong alliance system.

For two centuries, politicians and some academics have been referring to the Iroquois roots of American government and saying what is distinctive about American democratic society with regard to individual rights, sovereignty residing in the people, and a strong union through federalism, came from the Iroquois and other American Indian confederacies. These concepts were here long before Columbus landed.

So, it is important to understand that the historical record is clear, but in the last 150 years much of the record has been ignored.

In searching through primary documents, I get the impression that most people doing biographies of James Wilson or some other founding fathers see a few references to Indians—particularly to the Iroquois—and not knowing much about American Indian ideas, they often view such references as being extraneous to their interpretations.

What I have been doing is reading through the documents and highlighting the foundings fathers' knowledge of the fact that Indians spoke in symbols—a bundle of arrows and wampum, other kinds of things—there is a clear pattern that the founding fathers knew these symbols and incorporated them into our national imagery. But the fundamental source has been forgotten or neglected.

I agree with the other members on this panel that it is time that there be recognition of the direct application of Native political theory and its profound impact on American ideas of democracy.

It is my hope that Iroquois and other Native Americans political theories, as a result of this bill and the studies of Professor Schaaf and myself, will be placed people alongside of John Locke, Rousseau, and Montesquieu, and the ancient Greeks so that an important source of what is distinctive about American democratic society will be recognized.

Thank you.

[Prepared statement of Mr. Grinde appears in the appendix.]

The CHAIRMAN. Thank you very much, Professor.

Ms. Locklear.

STATEMENT OF ARLINDA LOCKLEAR, ESQ., KNOXVILLE, MD

Ms. LOCKLEAR. Mr. Chairman, I appreciate the opportunity to appear before the committee this morning.

In S. Con. Res. 76, this Congress would reaffirm the longstanding and historic government-to-government relationship that exists between Indian tribes and the United States. In keeping with that commitment, it is appropriate that this Congress also review the quality of the historic relationship and make adjustments in the present day relationship between Indian tribes and the United States where necessary and helpful.

To aid in this process, I would like to comment this morning on the quality of that historic relationship that existed between the United States and Indian tribes, to give a sort of historic still life as to what the quality of that relationship was as of the time of the ratification of the Constitution.

At the time of first white contact on the North American continent, Indian tribes functioned, as a practical matter, as governments. Because of this reality, European governments dealt with Indian tribes as self-governing people.

From its formation, the United States adopted this same mode of dealing with Indian tribes, that is, as dealing with them as independent nations and sovereigns. Even before declaring their independence from Great Britain, the United States embarked on this political relationship with Indian tribes.

In July 1775, the Continental Congress resolved that:

> Securing and preserving the friendship of Indian nations is a subject of the utmost moment to these colonies, and it becomes us to be very active and vigilant in exerting every prudent means to strengthen those ties.

Consequently, the Continental Congress established three Indian departments, one in the northern, one in the middle, and one in the southern part of the United Colonies. Commissioners were appointed by the Congress for each of these departments. These commissioners were, in effect, ambassadors to the Indian nations located within their particular departments.

Throughout the Revolutionary War and early into the constitutional period, these ambassadors had the primary responsibility of maintaining peace with Indian tribes and also addressing other issues, for instance, failing the maintenance of peace, the conduct of war with Indian nations. This theme, the conduct of peace and war with Indian nations, was the primary theme, in fact, of the Federal-tribal relationship throughout the Articles of Confederation period and well into the early constitutional period of this country's history.

From 1775 on, the Continental Congress was engaged actively on almost a daily basis in the conduct of Indian affairs. The press of Indian business was such that the Continental Congress established a standing Indian committee in 1776. That committee directed the work of the Indian commissioners on all issues between the United States and Indian tribes that covered such things as trade, the integrity of territorial boundaries for those nations, crimes committed by citizens of one nation or the other in their territories, and also the issues of war and peace.

All of these matters are, of course, the usual business of nations and the fact that the Federal Government and the tribal governments dealt with each other on these issues shows that both understood the other as a nation and assumed that the nation to nation relationship would exist between the two.

Congress' mode of conducting business with Indian tribes also reflects their respect for Indian tribes as sovereigns. Congress received visiting tribal delegations as it did foreign ones. It defrayed the tribal delegation's expenses, bestowed gifts on tribal dignitaries, and exchanged previously approved diplomatic communications with tribes.

Congress used the language of international diplomacy in dealing with tribes. Tribal delegations were referred to in speeches and treaties as dignitaries and as deputies. Tribes were also called nations in the third person and as brothers when addressed directly, both of which denote equality between the two parties in the relationship.

And the administration of Indian affairs itself was handled directly by Congress, much as Congress handled the administration of foreign affairs. Even the executive department, after the ratification of the Constitution, handled Indian affairs at the cabinet level up until 1824 directly through the Secretary of War rather than through intervening bureaucracy.

Perhaps the strongest evidence of the character of the relationship between the United States and Indian tribes is the fact that these relations were conducted through treaties. Of course, the very fact that treaties were signed indicates a nation to nation relationship.

Chief Justice Marshall observed:

> The Constitution, by declaring treaties already made as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations and, consequently, admits their mark among those powers who are capable of making treaties.

The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations on the Earth. They are applied to all in the same sense.

The terms of the Indian treaties also reflect the parity of the relationship between the United States and Indian tribes. The first Indian treaty concluded by the Continental Congress, that with the

Delaware concluded on September 17, 1778, provided for an alliance between the contracting parties. It provided for the punishment of each other's citizens for crimes committed within their territories. It provided for trade, and it provided also that the Delaware Nation might confederate with other Indian nations "to form a state whereof the Delaware Nation shall be the head and have a representation in Congress."

Other treaties also included mutual assistance pacts, provided for the exchange of prisoners, contained reciprocal assurances of territorial integrity, and provided for the extradition of fugitives from justice. These provisions are, of course, typical of international treaties.

Finally, the Continental Congress' mode of conducting business with Indian tribes shows that the Continental Congress recognized the tribes' free will and where it impacted directly on the tribes or tribal members, Congress' Federal Indian policy always assumed or required the consent of the Indian tribe involved. For example, in early 1776, Congress authorized the use of Indians as soldiers in the American army only "where the tribes to which they belong shall, in council held in the customary manner, consent thereto."

Later that same year, Congress determined that disputes arising between whites and Indians should be adjudicated by arbitrators appointed one each by the Indian tribe and the State involved by the consent of the Indian tribe.

Again, in 1777, Congress resolved that the State of Pennsylvania must either remove its citizens who had settled illegally on tribal land or pay the particular tribe involved for its land at the option of the tribe involved.

It is important to remember that Congress did not choose this respectful approach in its dealings with Indian tribes out of some beneficial attitude or beneficence on its part. Rather, it did so as a matter of practical and historic necessity.

We must remember that at the time, that is, immediately before and for some considerable period of time following the ratification of the U.S. Constitution, Indian tribes were significant players on the international scene. In the northern part of the Indian department, Iroquois and other tribes had practically engaged during the Revolutionary War in hostilities with the United States and had signed peace treaties with the United States to end those hostilities.

Many of the Iroquois Tribes were not happy with the terms of those peace treaties and refused to accept new boundaries that the United States would impose. Hostilities continued as a result. When frontiersmen flooded onto Iroquois territory for settlement purposes, hostilities increased.

Great Britain encouraged these tribal resentments and because Great Britain, after the Treaty of Paris, retained significant forts themselves located within American territory, those forts and the practical possibility of a definite alliance between the Iroquois and Great Britain greatly concerned the United States. The United States feared, in fact, that had an alliance been formed between those two parties, it would threaten the actual existence of the United States itself.

Similar problems existed in the south. The Creek Nation had, in 1784, in fact signed a treaty of alliance with the nation of Spain which provided for mutual assistance in the event of any invasion by an outside force. Frontiersmen, as had happened in the north, also invaded southern Creek territory. Hostilities ensued, actually supported by the States of North Carolina and Georgia.

As did Great Britain in the north, Spain in the south supported the tribes in their efforts to resist these intrusions into their territory. There was in fact and in reality an alliance, as a result of the treaty of 1784, between Spain and the Creek Nation.

The United States, fearful of a three-way alliance between northern tribes and Great Britain on the one hand, the Creek Nation and Spain on the other hand, and the Indian nations among themselves in the west, actually feared for its continued existence immediately before and immediately following the ratification of the U.S. Constitution.

There were Indian leaders who sought to capitalize on the possibilities of these alliances. The great Mohawk Indian leader in the north Brant, visited Great Britain on at least two occasions and came very close to actually forming the alliance that the United States feared at the time could threaten their actual existence.

These incipient and actual alliances continued before the adoption of the Constitution and for some years after the adoption of the Constitution. So, the practical necessity of avoiding war which threatened their very existence colored the United States' perception of and relationship with Indian tribes.

By virtue of this necessity, then, the United States dealt with tribes as equals, as parties capable of and very nearly accomplishing a complete war against the United States that would threaten their existence.

These were the circumstances and the experience of the delegates who attended the Constitutional Convention in 1787. Approximately three-quarters of the delegates in attendance at that convention had in fact served as members of the Continental Congress and, therefore, had participated in the formulation of Indian policy.

Some of the most significant contributors to the formulation of the Constitution had in fact been directly involved. James Madison and Thomas Jefferson had, as Members of Congress, played major roles in drafting the Indian clause in the Articles of Confederation. James Wilson and Charles Pinckney who played a direct and significant role in drafting the Indian commerce clause of the U.S. Constitution had served as members of the Continental Congress of the standing Indian committee.

As a consequence, all of these Members formulated their perception of the continuation of the relationship between the United States and Indian tribes based on that experience and the practical necessities of the times. These experiences and practical necessities demonstrated that the Constitution and the Indian commerce clause confirm a true nation to nation relationship between Indian tribes and the United States.

As history shows, that relationship was a bilateral one between equals. The participants respected each other's territory, the civil authority over their own citizens, and each other's free will. Neither side presumed to dictate terms of the relationship to the other.

That is the quality of the nation to nation relationship that existed at the time of the adoption of the U.S. Constitution, and that is the quality of the relationship that the founding fathers of the Constitution assumed would continue.

Thank you.

[Prepared statement of Ms. Locklear appears in the appendix.]

The **Chairman**. I thank you very much.

We have a roll call in progress at this time. Therefore, I would like to call a short recess, and we will resume in about 10 minutes.

[Recess taken.]

The **Chairman**. The committee will please come to order.

I would like to now recognize Professor Deloria.

STATEMENT OF VINE DELORIA, PROFESSOR, UNIVERSITY OF ARIZONA, TUCSON, AZ

Mr. **Deloria**. Thank you, Senator Inouye.

I delayed my testimony because it doesn't directly relate to the Iroquois situation.

I want to thank you for introducing the resolution, and I would like to make some suggestions about how in the next couple of years some of this spirit of the resolution can be carried out.

Quite often, the Congress and political theorists describe the United States as a system of checks and balances where the three branches of government work together and place limitations on each other. The problem that American Indians have is that checks and balances really don't work with Indian tribes.

American history shows that when dealing with Indians the three branches defer to each other, the ultimate deference being then to the Congress and no checks and balances exist. The Congress, at least in the last 100 years, in my opinion, has transferred a good deal of its legislative authority to the Federal bureaucracy by attaching to legislation, in most instances, the authority to promulgate rules and regulations to carry out the effect of the statute.

The net result is that there are no protections for Indian people, their rights, or their property. The bureaucracy in effect, makes up the rules under which Indians live.

The courts pick up on bureaucratic practices and declare that long established administrative practices are evidence of the intent of Congress.

As a result, the protections granted all other Americans under the Constitution never come into play with Indian people, and we have seen our status go from dependent domestic nations to virtually helpless wards of the government where, in some instances, it takes the signatures of up to 20 bureaucrats to use a piece of Indian land.

The Arizona Republic has recently come out with a series of articles on the Bureau of Indian Affairs and the Federal Administration. In my youth, we used to call the Bureau a hotbed of inertia, but today I think you could call it a crime in progress if the stories in the Republic have any validity.

My concern at this hearing is that we can do all the investigations and newspaper reports that we want, but ultimately there will have to be certain fundamental structural changes involved in the definition of the Indian-Federal relationship, one of which is clear definition of the status of Indian tribes. If the United States is a government of consent, then I think we look at American history at what point Indians consented to have relations with the United States and to place themselves under Federal protection.

This point can only be found as a voluntary expression in the Indian treaties, and those treaties were supposed to be the supreme law of the land. That is in the Constitution in Article I. However, we have seen the treaties since 1870 be consistently overruled by subsequent Congressional statute.

Now, when I speak of courts deferring to Congress or the executive deferring to Congress, the most frequent situation we have is where Congress passes a statute not believing that it is in conflict with an Indian right or property, and a subsequent controversy arises, and Indians go to court. The court defers to Congress in the sense of recognizing the plenary power of Congress over Indians, and the court then creates a fictional scenario in which they create a fictional intent of Congress.

The best example I can think of is the debate on Federal water rights in the 1950's where it was clear that Indian property would not come under the McCarran amendment, but subsequent litigation interpreted the McCarran amendment to apply to Indian rights because they had an aspect of Federal protection to them, and we are included in the bundle of Federal rights.

In *Lone Wolf* v. *Hitchcock* and a number of other classic Indian cases, we have instances in which the Supreme Court of the United States simply creates legal doctrines that give Congress overwhelming power over Indian tribes and, in effect, overrule treaties, although it is never clear in the actual statute in question that Congress ever intended to overrule any Indian treaties.

I would suggest the best parallel of the relationship of tribes to the United States is the 10th amendment, and that is the U.S. Government is a government of delegated powers, delegated by the people, delegated by the States to the Federal Government. All powers not delegated to the Federal Government are reserved to the States or the people respectively.

In like manner, the Indian treaties are a delegation of certain rights and properties to the United States with a withholding of similar rights and properties to the Indian tribes. That doctrine, enunciated in the Northwest fishing rights case, *U.S.* v. *Winters,* says anything not delegated to the United States must be reserved to the tribes and the people of the tribes.

So, there is a definite legal status to being a dependent domestic nation, but unless we have a clear statement by Congress of what this relationship is, we will continue to be forced into expensive litigation in which the Federal courts have an absolutely free hand to announce strange doctrines constructed only with the intent of reconciling a longstanding treaty right with a Congressional statute with the history of the Congressional statute showing that there was no effort by Congress to discuss Indian rights prior to its passage.

Additionally, we have other doctrines of interpretation that are used in the Federal court when interpreting primarily general legislation that I think are extremely detrimental to Indian tribes. We need clarification of those.

The logic in a lot of this interpretation is deadly, inescapable and unjust: if Congress intended to include the Indians in this legislation, it would have specifically said so. The reverse of that coin is that if Congress had intended to exclude Indians, it would have specifically said so. All of us in this room can see the arbitrary nature of law when a judge has the option to say you are either inside or outside the confines of the law, depending on whether I choose to create the fiction that if Congress had wanted to include you they would have mentioned you, if they wanted to exclude you they would have mentioned you.

As long as legal doctrines like that are used freely in the courts of the United States, there will be no end to litigation. There will be no solution to Indian problems. With the Federal bureaucracy vested with almost unlimited powers, Indian tribes at this point must have some vested rights under the Constitution to protect themselves.

The only way we can vest those rights is a series of clear Congressional directives. These directives would be to the Government as a whole. They would have to be recognized in the Federal courts as doctrines of interpretation which express the intent of Congress, doctrines which must be followed in hearing and resolving Indian litigation. These would be doctrines that should be followed by people in the Federal bureaucracy. These would be doctrines that would hopefully be followed by subsequent administrations and executive officers.

I would suggest the most needed doctrine at the present time is a clear statement that unless Congress specifically examines Indian treaty rights or outstanding statutory rights and specifically includes Indians in legislation, national legislation does not apply to Indian tribes. If we had that directive, we could eliminate a good deal of the litigation that is going on today.

But we have to have a clear statement so that, one, we minimize litigation, and, two, when we go to court, we have an even chance of getting a resolution of the problem.

One of the big problems that we additionally face is the recognition that the original treaty relationship was a relationship of consent. Following the session of treaty making in 1871, the right of Indian consent was gradually whittled down by bureaucratic inroads. In recent times, particularly beginning with the 1934 Indian Reorganization Act, the idea that Indians should be consulted before legislation or programs for them were put forth became very popular, and this was very popular in the 1960's when the poverty wars were going on and people were saying that you should consult the poor before you proceed.

The current state of Indian affairs shows consultation is a myth. When you view it from the bureaucratic standpoint, consultation merely means that you try to talk the Indians into what you want to do. Following that meeting, you proceed to do what you want to do anyway.

What we need is a Federal statute saying that there must be Indian consent before any program of the Federal Government can be operated on a reservation or operated in a manner that would affect Indian rights. We need the right to say "no" to Federal statutes insofar as they are effective on the reservation. The IRA is interpreted as meaning that the word of the Secretary of the Interior is the dominant word on the reservation, and that the Secretary of the Interior must approve all tribal resolutions passed. What we need is a statute saying that if a tribal council votes no, then the decision of the Secretary of the Interior is not the law for the reservation, the decision of the tribal council is.

This change will prove controversial in a number of cases, but unless we have some checks and balances to protect ourselves against the Federal bureaucracy, there is no way that anything is going to change out on those reservations. The bureaucrats simply make up the rules as they go along.

I could cite chapter and verse for the rest of the year on conflicting interpretations of Federal law given at different area offices at different times with regard to the same thing. But there is a final thing that I think must really be considered, and that is that the question of the honor of the United States. Its relationship to Indians has to be raised in a Congressional context. The treaties are more than a legal document. They are a pledge of the integrity of one people to another. We have seen the integrity of the United States badly eroded on the justification that there were certain expedient things to be accomplished. The frontier has been settled for quite a while, and we are now approaching the 500th anniversary of the landing of Columbus. So, 500 years of contact with Western European civilization is enough. We need some protections so that we can continue our own existence.

Honor and integrity require that Congress follow up on oversight hearings on everything the Federal bureaucracy does. Let me cite you two examples of what I consider almost criminal Congressional negligence.

The Indian Claims Commission Act was passed in 1946. It was intended to be a commission, and the premises of that Act were that within 5 years in open and informal hearings, the commission could look at the Indian claims and reach some just settlement. Section 13, I believe it was, gave that commission investigatory powers, and the commission was supposed to look at all the claims in an informal layman's equitable eye and determine the validity and scope of those claims.

The Claims Commission, within 5 years of its founding, was turned into another Federal court with all the Federal court procedures. The investigative division or function of the commission was simply truncated. It got so bad that Commissioner John Vance in the late 1970's published an article saying that what the claims commission was doing was ridiculous. He first pointed out that instead of a commission fairly hearing claims, the commission had been turned into a Federal court in which lawyers dominated and Indians were not allowed to speak their peace.

It is no secret to any of us that there are a lot of mad Indians out in the United States, my own tribe, the Shoshones, and others who feel they have been unjustly handled by the Indian Claims Commission. If you look at the response of Congress after it authorized the Indian Claims Commission, it is negligent and negligible. Not once did it go back and call those commissioners to account for turning the commission into a court instead of a commission. The several hearings that were held renewing the Claims Commission simply concentrated on what additional procedures might be needed in order to resolve the claims.

As a result, claims turned into simply money judgments against the United States. The right to religion, the right to culture, the right to self-government never came up in the Claims Commission. A lot of tribes did not want to say the United States had taken their land; they wanted assurances from the United States that they could practice their religion freely and that they would not have their children subject to compulsory school attendance hundreds of miles from their home. They wanted a great many cultural freedoms and protections and that is what they thought a settlement with the United States would be, that you would finally settle accounts and live together as the wampum belt shows.

At any time between 1944 and the present, Congress could have held oversight hearings, it called those bureaucrats and commissioners to account, and it could have turned that situation around so that we would not have the volatility out in Indian country that we have today.

The second example is the recent passage of the American Indian Religious Freedom Act. This resolution is as innocuous as can be. Representative Morris Udall got on the floor of the House of Representatives and he said this is just an expression of Federal intent; it is not going to affect any laws. Nevertheless, the resolution directed Federal agencies to go into consultation with Indians before they proceeded with their programs in any instance where it would conflict with Indian religion or practice of traditional things.

The attacks on traditional religion since the passage of that resolution are absolutely astounding. There has been more litigation on Indian religious questions since Congress attempted to clarify that than there were before. The courts, with no direction from the Congress, have now evolved a doctrine that an Indian religious practice must be the central core of the religion in order to be protected. A good many Indian religious practices are now described as merely cultural artifacts and not religious practices at all.

In the last 10 years, we have come under a more severe oppression of religious freedom than we did before Congress passed the American Indian religious freedom resolution. So, my request in the hearing is for you to take to your colleagues in Congress the demand that national honor be demonstrated, and part of this national honor would be a clarification of the Federal laws and the interpretation of Federal laws that are applied to American Indians.

The second thing would be severe oversight hearings on Federal agencies dealing with American Indians. It is quite an embarrassment to me and to other people in this room and, I am sure, to you, Senator, to realize at this stage of American life there is virtually no accountability in the Federal Government, particularly in the executive branch and specifically with relation to us in the Department of the Interior and the Bureau of Indian Affairs.

If Congress chooses to maintain it has a plenary power over Indians, then we think the plenary power should be used in a positive manner and the Federal agencies dealing with American Indians should be held to account and held to the highest standard of behavior and that the whole Federal Government should recognize that the status of dependent domestic nations has quite a bit of substantial content, content found in the Constitution and in American history.

In the next couple years, if we could have hearings on the substantive legal issues and then get some very short declaratory and clarification statutes defining what Indian rights are, that would give us the necessary leverage and the standing to then help do better in defending our own rights. In that spirit, I hope this resolution simply marks the beginning of what could be a new and very aggressive defense of American Indians' rights and their communities.

Thank you very much.

[Prepared statement of Mr. Deloria appears in the appendix.]

The CHAIRMAN. To say that this was a fascinating discussion would be an understatement, and to suggest that this was a very important panel would be a gross understatement. What you have just said, Mr. Deloria, is foremost in my mind.

I have been chairman of this committee now for 10 months, and in order to acquaint myself with the concerns and problems of Indian people, it may surprise you to know that I have spent more time conducting hearings relating to Indian affairs than all the other committees over which I chair combined, including the Iran committee. I am Chairman of the Appropriation Subcommittee on Foreign Operations and the Subcommittee on Communications of the Commerce Committee.

I have, early on, set an agenda for this committee and myself in particular to seek the advice and absorb the wisdom of Indian people. As a result, I must most shamefully note that I was the first chairman to ever visit the Pacific Northwest. I was the first chairman to officially visit the Navajos or the Hopis or the Yakimas or, for that matter, just about any tribe in the Southwest and the Pacific Northwest.

Congress when it legislates does not do so all the time on the basis of compassion or justice or equity. That would be the ideal situation that legislation be based upon sensitivity, equality, and justice.

Unfortunately, Congress makes decisions based upon the scale of political power, and if the scale is heavier on the Indian side, once in a while, the Indians get a break, but all too often, as most of you must have noted, the scale of power is on the other side.

This committee is, I think, a classic example. This is a relatively new committee because it was not in existence two decades ago. When it was restored, it was a temporary committee. That is why it still has the designation of being a select committee. A select committee in the Congress usually suggests that the committee is for a given purpose or given term, like the Select Committee on Iran-Contra Affairs.

This committee today is a permanent committee. We are in the process of amending the title by deleting "select."

On my agenda, I feel that there are many things that have to be done. One, the people of the United States must be made aware of this unique relationship. The purpose of these hearings and, incidentally, the major purpose of the investigation committee is not the investigation of crimes, because in the final analysis, the investigation of alleged crimes would be conducted by other authorities, the Justice Department or the U.S. Attorneys or the courts.

If one should look and study the resolution that created the committee, you will note that the most important aspect is to investigate this relationship between the Government of the United States and the sovereign governments of Indian people, because, as noted by all of you, clarification is long overdue. Our dealings with Indians have been based upon myths, on misunderstandings, and as Professor Deloria indicated, the assumption of authority which I do not feel was properly delegated to the bureaucrats of this Nation.

It will take a while, but I can assure you that we will look into this and, hopefully, at the appropriate time, begin the process of clarification.

It may interest you to know that at this very moment, the Senate of the United States is debating the farm credit bill. In this huge measure are two provisions that should be of intense interest to all of you.

One, if adopted, would begin the change in the nature of trusteeship and land tenure. It says that if an Indian person or tribe should find itself unable to pay its debts to the Farmers Home Loan Bank, this land may be acquired by any Indian of any tribe. So, a Yakima could conceivably become the owner of Navajo land—or any tribe. Navajos could purchase Yakima land.

There is another provision in there that says if an Indian tribe or person or corporate entity should purchase land which was at that moment subject to county or State taxation, that right of taxation will follow the land. This will be the first intrusion into the long established policy that Indian land is not subject to taxation.

So, what I am trying to point out is this is a matter of constant concern to some of us here. As soon as we conclude these hearings, I will go to the Senate floor to see what I can do to erase these two provisions in the measure. If you are interested, it is in title VI, section 602. If those sections ever pass, then the process of erosion of land tenure has legislatively and officially started.

I don't suppose the Members who proposed these amendments did so with any malice, but I think did so without the proper appreciation and recognition of this unique relationship of one sovereign with another. It will be a frustrating process at times, but I can assure you as chairman of this committee, we will explore this.

Since we have with us on this first panel historians and men and women who have spent much of their adult lives looking into the history of this relationship, I would like to get some clarification of what I have learned in the last few months.

I have been advised that since 1778—I believe that is the first treaty—we have had a total of 370 treaties between the United States Government and Indian nations. Is that correct?

Ms. **Locklear**. That is the figure that is usually used.

The **Chairman**. Am I also correct that provisions of every one of these treaties have been violated?

Ms. **Locklear**. I can't say that absolutely, but that would not surprise me, Senator.

The **Chairman**. Well, can you tell me of any treaty that has not been violated?

Ms. **Locklear**. None of the ones that I have worked on so far.

The **Chairman**. What is your understanding?

Mr. **Deloria**. There are technical attorneys' interpretations which is that various articles are specifically violated. I think the spirit of all the treaties or the pledge of good faith between Indians and the United States—that spirit has certainly long since been destroyed.

Even more important, there are probably close to 800 treaties all told, about 430 of them being unratified treaties and a number of those unratified treaties being very important to Indians. The California treaties, for example, were hidden in the Senate chambers for over 50 years because people didn't want to deal with California land title.

The land titles in the Washington and Oregon area—the tribes signed those in good faith, and the United States needed those treaties to exert a claim against Great Britain for Oregon, but those treaties were never ratified.

So, not only have ratified treaties been violated, but the United States has claimed to own lands based on treaties that it itself refused to ratify or admit as a legal document. So, it is a very sordid history.

The **Chairman**. I have been advised that 200 years ago, the Government of the United States recognized the sovereignty of Indian nations over 550 million acres of land. Would that be correct?

Ms. **Locklear**. That sounds again roughly accurate, Senator. I am sorry that I can't say I have ever totaled the acreage, but given what we do know about the Iroquois tribe's territories, for example, in New York State and the acreage covered there, I would suspect that is correct.

The **Chairman**. And this recognition was articulated in our treaties. Isn't that correct?

Ms. **Locklear**. That is correct.

The **Chairman**. And I believe the record will show that today, Indian nations have sovereignty over 50 million acres of land.

Ms. **Locklear**. That is correct.

Mr. **Deloria**. Approximately.

The **Chairman**. So, the violation of these treaties resulted in the loss of 500 million acres of land if my mathematics are correct?

Mr. **Deloria**. Yes, right.

The **Chairman**. One hears of the so-called American policy to make certain that Indians were pressed west of the Mississippi. Was there ever such a Federal policy and, if so, when was that enunciated?

Mr. **Deloria**. That is a removal policy, Senator. The first prominent mention is when Thomas Jefferson in buying Louisiana thought it would be a good place to put the Indians west of the river. By about 1812, there are removal treaties signed in the Ohio area that begin to move people west, but the best known is the Act of 1830, the Removal Act, which passed Congress by a very slim majority which authorized the President, Andrew Jackson, to negotiate with the tribes of the south and move them west. Of course, there was virtually no negotiation. They just said you have to move west now and forced these treaties through.

Removal was discussed as late as 1891 after Wounded Knee Massacre. There was a discussion of moving everybody to Oklahoma and ringing Oklahoma with forts and barbed wire and just keeping people there until they were civilized, but that failed for lack of appropriations, from what I understand.

Removal occurs over and over again. It is basically a policy to move the Indians out of the way of whatever the United States wants to do.

The Chairman. We hear much of the Indian Wars. What period did this cover?

Mr. Schaaf. My understanding is the period of Indian Wars began—there was a series of stages. At the first initial contact, there was peace and friendship, because the European settlers who came here needed knowledge and skills and help and assistance of Native peoples. We have just celebrated Thanksgiving which, in part, is to commemorate the spirit of that relationship that was initially formed.

Then, when the balance of power begins to shift and certain individuals feel bolder that they can begin to claim or take by means of force or sometimes fraud certain tracts of land, then certain individuals become more aggressive. As a result, disagreements have occurred, sometimes misunderstandings through lack of communication. As a result, Indian people have stood up to try to defend their rights. As a result, sometimes violence has been perpetrated against them.

As an example of misunderstandings and how wars got started early on, when the European settlers came here, they thought it was perfectly all right to go out and hunt a deer in the forest, but if an Indian man hunted a cow, well, that would be considered thievery. As a result, there needed to be actually a joint system of justice.

The Chairman. If I may interrupt at that point, when did the United States Government begin to officially commit military units?

Mr. Schaaf. The policy changed actually quite early on. I found documentation in the secret proceedings of the Continental Congress. The original policy early in 1776 was one of peace and neutrality.

George Washington needed soldiers to fight in the Revolutionary War, so he and three of his generals went secretly to Philadelphia and lobbied the Continental Congress to change the policy to one of war and aggression. He in a sense was saying Indians either have to join us and join the United States Army or they will be against us.

At that point in time, a policy began to change, and the original position was that the United States encouraged peace and neutrality among Indian nations, and the Grand Council agreed with that. In fact, I found exact documentation that the Grand Council of the

Iroquois Confederacy in 1776 called all the warriors in at a time when the British were offering bounties for American scalps.

Two of the chiefs went out and actually brought all of the warriors back in, and they said the British are trying to get us involved in war. The Americans are not. They are saying remain in peace and neutrality and within friendship. That is what is within our best interests.

When that policy changed and United States officials began to actively try to get Indians involved in war, that is when the Confederacy began to question whether or not these promises that were made for as long as the sun shines were really true.

The CHAIRMAN. When did the Indian Wars end?

Ms. LOCKLEAR. If I may, Senator, in his original edition, Felix Cohen observed that there were warlike relations maintained with certain tribes up until the late 19th century. However, most of those wars were not of the nature that threatened the existence of the United States or extended really beyond a regional basis.

The original hostilities with certain powerful Iroquois Tribes and western tribes either immediately before, during, or after the Revolutionary War were of such a nature, however, that they did extend beyond simply regional boundaries and threaten the existence of the United States.

However, war conditions existed on one level or another with one tribe or another, according to Felix Cohen, up until the late 19th century.

Mr. LYONS. I think the point should be recognized that in Fort Sill, Oklahoma, the Apaches were still in prison well into the 20th century, the early part of the 20th century. So, you could say that existence continued right up into this century, and it is an important aspect for American people to consider that such a thing would continue up until this moment.

I would also like to say that the first treaty was made in 1776 with the new nation rather than 1778, and that was a treaty of neutrality and peace for which the large belts were brought and exchanged.

The CHAIRMAN. I have been told by anthropologists and historians that about 200 years ago, there were at least 12 million Indians residing in what we call the continental United States. Would that number be correct?

Mr. LYONS. It is a difficult question again, but it is also conservative. There are larger estimates.

The CHAIRMAN. That is why I said at least.

Mr. LYONS. Yes; at the very least. That is a conservative estimate.

Mr. SCHAAF. Carl Deggler who is one of the leading demographers who studies populations estimated that at the time of European contact, there were over 100 million Indian people in North America?

The CHAIRMAN. In the continental United States?

Mr. SCHAAF. Within all of North America.

The CHAIRMAN. What would be your estimates?

Mr. DELORIA. I think 50 to 70 million in the continental United States, Senator.

The **Chairman**. Then, I have been told that at the end of the 19th century or about the time the Indian Wars ended, there were approximately 250,000 Indians residing in the United States.

Mr. **Deloria**. That is the official census, but what you have to recognize in that figure is there are a lot of Indian communities that were not identified as Indian who have been since identified as Indians. The Federal census used to depend on the Bureau of Indian Affairs, and the Bureau of Indian Affairs used to do estimates. A Federal census taker would come to a canyon and shout, how many Indians are down there? If an echo came back, well—that figure is highly unreliable.

The **Chairman**. That is very scientific.

Mr. **Lyons**. I think the point being made is correct, though. There were very many fewer Indians at that time, and the question remains as to what happened to all of those people who were original to these territories and lands.

The **Chairman**. So, you are saying that 200 years ago, there were about 50 million Indians residing in the continental United States?

Mr. **Lyons**. Right.

The **Chairman**. And that can be appropriately documented?

Mr. **Deloria**. It is the middle figure between very conservative people who say 12 million and more liberal people who say 100 to 120 million. So, I think in the middle is reasonably good.

You would have to do extensive study, but to give you an example, the Chinook population over a 3-year period went from 50,000 to less than 5,000. These are people that lived along the Columbia River. In the years 1828 to 1831, they were ravaged by a strange flu, and it wiped out 90 percent of the population.

You can go to the Mandans who were at 15,000 to 17,000. They got wiped out to less than 500.

Diseases did an awful lot of this, but one of the problems is that we won most of the wars that we had with the United States, so that is why we are on the short end of things.

The **Chairman**. I shall do my best to make certain that your statements will be read carefully by members of this committee and, hopefully, the rest of the Congress. I thank you all very much.

Mr. **Lyons**. Senator Inouye, I would like at this moment to have the delegates from the Seneca and Mohawk and the Oneida Nations just to stand and be recognized.

The **Chairman**. Please, yes. We thank you for your contributions to the creation of this country.

Mr. **Lyons**. Thank you.

The **Chairman**. Our next panel consists of the Chairman of the Red Lake Band of Chippewa Indians, the Honorable Roger Jourdain; and the Chairman of the Quinault Nation of Washington, the Honorable Joe DeLaCruz; and the Chairman of the Lummi Nation of Washington, the Honorable Larry Kinley.

Chairman Jourdain, it is always good to see you, sir.

Mr. **Jourdain**. Same to you, sir.

The **Chairman**. Would you like to begin?

Mr. **Jourdain**. Well, I am going to defer the opening statement here to one of Wendell Chino and Jourdain's godsons, one to my right, Joe DeLaCruz from way out in the Pacific Ocean. He keeps the enemy away from the shores of Red Lake. From the West we have my friend and colleague here who is an up and coming chairman of the country, Larry Kinley.

However, I want to apologize for the absence of our colleague and co-chairman of the alliance, Wendell Chino. At the moment, he is in court fighting for his water rights, as I understand it, and that is what he has inherited from his great-great-great grandfather, Geronimo. So, we will do the best we can to represent him as well and many other people across the country.

Joe DeLaCruz has been on the firing line for a long time, and his credentials are outstanding. So are Larry Kinley's.

So, Joe, you are on.

STATEMENT OF JOE DELACRUZ, CHAIRMAN, QUINAULT NATION, TAHOLAH, WA

Mr. DeLaCruz. Thank you, Roger.

Roger asked that I lead the panel off and, Mr. Chairman, I am deeply honored to have the privilege to testify at this hearing and be here today to hear the preceding panel of historians and legal scholars on the contributions of the first people on this land to the first democracy of the world.

I want to give a little background of the Alliance of American Indian Leaders which I was honored again to be asked to sit and serve with. In the spring of 1986, the Indian Rights Association, in commemoration of the bicentennial of the United States Constitution, sent out a questionnaire to all the Indian tribes and Alaska Natives that they had addresses for to deal with questions of Indian relations with the United States as per the Constitution.

Mr. Wendell Chino and Mr. Roger Jourdain called many of the tribal chairmen across the country and asked if we would come and sit and take a look at the Indian Rights Association's questionnaire and see if we couldn't pick up on what the Indian Rights Association was starting regarding the bicentennial year of the Constitution.

I was honored to sit with a group of tribal leaders in December 1986 where we formed what we called an Alliance of American Indian Leaders. At the time, there were only a dozen of us: Roger Jourdain, Wendell Chino, Larry Kinley, Art Gahbow, Earl Old Person, Richard Real Bird, Joe American Horse, and myself.

As I sat around that table in debate with colleagues, at times being at odds with one another, we came to the conclusion that it would be worth our while in the years that many of us have served in office. I might point out that my elder and one I consider the senior statesman of Indian country, Mr. Jourdain, has been the chairman of his tribe for going on 35 years. Mr. Chino had been chairman or president of the Mescalaro Apache Tribe for 25 years. As I looked around that table—Earl Old Person has been Chairman of the Blackfeet Tribe since before many of us remember—I felt so pleased that I was called and able to sit with these men who have seen over 200 years of frontline experience of our leaders and their relationship with the United States, the Congress and the judicial branch.

The many court cases that Vine was talking about came about because of these leaders I was sitting with.

We decided that we would form an alliance. We weren't going to create an organization. We have many Indian organizations. But we would commit ourselves to spend the next couple of years trying to bring about the changes that have been spoken of by Indian leaders through Indian organizations for the last 80 years.

So, that was the start of the Alliance of American Indian Leaders that went into an alliance with the Indian Rights Association regarding the bicentennial commemoration of the United States Constitution.

A month or so ago, the Alliance co-sponsored a symposium in Philadelphia with the Indian Rights Association. Again, it was very exciting to sit and listen to the various historians and legal scholars and tribal people on the various panels presenting their views of our people's relationship with the United States regarding the Constitution.

It was also very sad hearing some of the violations of that Constitution over the past 200 years, but it was a good feeling to recognize that our people have survived, they have endured, and we are still here today in a country with a democracy that we sit down and talk about correcting and straightening the record.

I have prepared testimony for the record that you have a copy of, and I would like to highlight some of my testimony, but I wanted to give you some background on the Alliance of American Indian Leaders. At the meetings that we have had, there have been various tribal chairmen who have come when they could, and they had to bear the expense of attending our meetings. I think, looking through the list of the meetings we have had, we have had as many as 70 chairmen at one time or another in some of the meetings and our discussions regarding this issue.

In Philadelphia, there was a professor there whose opening remarks I really feel necessary to leave in the record here, because I appreciated the statement that was made by Dr. Milner S. Ball. I think he is the dean of the University of Georgia School of Law. The premise of domestic law started with Georgia in the conflicts with the Cherokees.

Dr. Ball stated in a book he had just published with the American Bar Foundation Research Journal:

> "We claim that the constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land. But we also claim to recognize the sovereignty of Native American nations, the original occupants of the land. These claims—one to jurisdictional monopoly, the other to jurisdictional multiplicity—are irreconcilable. Two hundred years have produced no resolution of the contradiction except at the expense of the tribes and the loss to non-Indians of the Indians' gift of their difference.

As an alliance, we wholeheartedly support the resolution and the work you as chairman of this committee and the committee is doing in commemorating the work of the Iroquois, and I want to speak to the other parts of the resolution.

I certainly hope that S. Con. Res. 76 will serve to educate the American public as to the American Indian's sovereignty as embodied in the Constitution. I hope it will create a meaningful improvement in relations between the American Indian tribes and the United States.

The American Indian people have suffered and endured and survived over the last 200 years despite the assurances of the Constitution, the Northwest Ordinance of 1787, and solemn treaty agreements between leaders of nations. The American public, including Congress and the Federal bureaucracy, needs to be educated about American Indian treaties, governments, and cultures.

Limited public knowledge about the American Indians creates obvious opportunities for political mischief and negative racism. S. Con. Res. 76 could serve as the cornerstone to fully inform the American public as to our rightful place in history and the modern world.

A government to government policy should promote tribal self-government and tribal self-sufficiency. There is a big difference between stated Administration and Congressional policy on government to government relations and the continued practice of bureaucratic control of American Indian governments.

According to Felix Cohen, self-government is the Indian's only alternative to the rule of government departments. Since 1948, Indian leaders, especially through the National Congress of American Indians, have been appealing for tribal control of their own affairs.

The Indian Self-Determination Act of 1974 achieved Indian responsibilities to provide services to their people but not the authority to decide with flexibility how to meet their unique tribal needs. As NCAI president, I proposed a tribal grant in aid act in 1983 as the next logical step toward tribal self-government, directing funding from Congress to the Treasury to the tribes.

The current Public Law 93-638 amendments show substantial progress, but we are both hopeful and skeptical of the Administration's proposed demonstration projects. As sovereign governments, we must make our own decisions and determine our own destinies.

American Indian tribal governments, the United States Government, and Congress should engage in a consultation on restructuring of the Federal administration of Indian affairs. The Bureau of Indian Affairs has evolved from the first executive agency of the Continental Congress in 1775 to regulate trade with Indians and make treaties to the current multi-layered bureaucratic structure managing all aspects of our lives and usurping most of the appropriations Congress designates to help American Indian people.

NCAI over the years and the American Indian Policy Review Commission have consistently recommended a restructuring of the Federal administration of Indian Affairs, but nothing has happened due to tribal unfounded fears of a diminishment in the treaty trust responsibility protections and the bureaucracy's unwillingness to relinquish control and Congressional apathy.

A consultation process between the United States and Indian tribes needs to be established. Tribal direct involvement is essential to improving the Federal administration of Indian affairs.

Extensive dialog, debate, and negotiations will be required to achieve mutual agreement. Tribal involvement in the U.S.-Canada Pacific Salmon Treaty is a prime example of successful resolution and management of an extremely complex fisheries issue.

Hopefully, the future of field hearings on S. Con. Res. 76 will be instructive to the importance of involving American Indian people in the policies and programmatic decision making process affecting their quality of life.

With that, Senator, I highlight the testimony that I have prepared, and I will now yield to my colleagues, and I will be prepared to answer any questions.

Thank you.

[Prepared statement of Mr. DeLaCruz appears in the appendix.]

The CHAIRMAN. I thank you very much, Chief DeLaCruz.

Chairman Kinley.

STATEMENT OF LARRY KINLEY, CHAIRMAN, LUMMI NATION, WASHINGTON

Mr. KINLEY. Thank you, Mr. Chairman.

I also appreciate the opportunity to testify on the meaning and the merits of S. Con. Res. 76, and am personally honored to be at the hearing to listen to the distinguished panel preceeding ours as well as to be here to learn from my distinguished colleagues.

American Indian tribes welcome this Congressional resolution which makes a clear statement regarding the constitutionally recognized government to government relationship with Indian tribes and reaffirms the trust responsibility and obligations of the United States to Indian tribes.

I would like to make a brief verbal statement and then submit some written testimony.

The CHAIRMAN. Without objection, all of your prepared statements will be made part of the record.

Mr. KINLEY. The basic issue confronting us today is a cumbersome, unwieldy bureaucracy built layer upon layer over the years being pressured by frustrated tribal governments yearning for independence in the management of their affairs and seeking a larger share of the resources allocated for their benefit.

We seek the opportunity to govern ourselves as recognized sovereign nations, but we question the will and resolve of the Congress, established Federal systems, and the general public to allow this logical concept to become a reality. Established political systems and entrenched bureaucracies stand as formidable obstacles to the intentions of S. Con. Res. 76.

I would like to address today some of these more obvious political and bureaucratic obstacles. These obstacles can be overcome by a Congressional commitment and will to seek a true government to government relationship.

First, there are natural tensions between sovereigns. Tensions between nations and between nations and States over sovereignty and jurisdiction are a natural consequence of geography.

To reduce these tensions or direct the tensions toward peaceful resolution, mechanisms are established between governments. Government to government relations, formalized to ensure appropriate resolution of disputes and mutual cooperation are the customary means for neighbors to deal with one another.

Second, greater powers protecting lesser powers does not preclude lesser powers from exercising full powers of sovereignty. Relations between nations and relations between nations and States have evolved over centuries, and from these interactions there evolved a body of customs which is codified into a body of international laws. Customary international relations typically recognize that there are times when greater powers may be granted or may assume the responsibility for protecting and assisting lesser powers.

By a lesser power taking the protection of a greater power, the lesser power retains its full powers of sovereignty, precisely the terms used in the U.S. Supreme Court case *Cherokee* v. *Georgia*. Chief Justice Marshall clarified that "dependency was a narrow concept, that while tribes were dependent on the Federal Government for supplies and protection, their sovereign powers were to be respected. This concept was embodied in the League of Nations mandate system and later in the United Nations trusteeship system.

Third, trust responsibility and the duty of a greater power: The U.S. trust responsibility toward Indian nations must be interpreted as a duty to protect and assist an Indian nation until it achieves the full powers of self-governance on a political plain equal to that of the United States of America. Currently, the Federal bureaucracy protecting us consumes 9 of every 10 dollars appropriated for our trust.

Fourth, Federation of Micronesia: a modern application of trust. Some contend that Indian nations should forever remain in a trust status dominated by U.S. bureaucracies or be assimilated and disappear. The folly of this logic is that in the last 28 years, the Federation of Micronesia, formerly part of the Trust Territory of Micronesia, demonstrates that a protected nation and the United States of America have the capacity to dynamically change their political relationship if they are prepared to enter into direct government to government negotiations.

Seeking to govern themselves, the Micronesians entered into direct government to government negotiations with representatives of the U.S. Government with ambassadorial status to develop a compact of free associations. What was once a trust territory is now four separate and distinct national units. The Federation of Micronesia is now a free associated state.

Political development which is assured to other nations protected by the United States must also be an option to Indian nations.

Fifth, the U.S. domestic legal system is an inappropriate forum of justice in Indian affairs. American Indian law is one of the most misunderstood concepts in the American legal system. We argue our positions in a virtual foreign court and are forced to educate against a societal bias.

Since the U.S. Supreme Court reviewed the case of *Cherokee* v. *Georgia*, it has been apparent that U.S. domestic courts are not legally competent to consider issues of dispute involving questions of the political sovereignty and jurisdictional powers of Indian nations. When the courts have considered such issues in connection with Indian nations, they have more often than not taken positions which permitted the U.S. Government to undermine national sovereignty and erode the jurisdictional powers of Indian governments.

The appropriate arena for these questions is in direct negotiations within the framework of government to government relations and not the alien U.S. courts.

Sixth, the court system views all tribes as the same and applies its decisions uniformly when, in fact, each tribe is unique in its treaty relationship to the United States.

There are more than 300 nations inside the boundaries of the United States, and each has particular characteristics and relations with the United States that cannot be generalized. The product of treating subjects as if there is a "generic Indian" is faulty thinking, inaccurate judgment, and confusion. Each case lost by a separate Indian nation reduces the sovereign status and jurisdictional powers of all Indian nations.

In all three branches of the U.S. Government, there is a tendency to generalize and over-generalize the first nations of this land. Continuation of this practice will simply further corrupt the political integrity of each nation and destroy nations with words.

Seventh, U.S. intervention into the internal affairs of Indian nations degrades the principle of trust responsibility and deliberately seeks disintegration of the political, social, and economic fabric of tribal societies.

The Dawes Act of 1887 divided reservations into small plots given to individual Indian and resulted in a loss of 90 million acres of tribal land. More recently, the IRS imposed Federal income taxes in 1982 on Lummi tribal fishermen whose income was derived from commercially fishing in treaty designated waters.

Both cases represent the United States addressing individual tribal members and circumventing the tribal political sovereignty and jurisdictional powers.

Eighth, the Federal Government speaks with many voices on Indian affairs, placing legitimate legal rights in the political arena.

Since 1982, the IRS has contended it has legal authority to tax Lummi tribal fishermen on treaty-protected income. Two Interior Department solicitors in 1983 and 1985 dismissed the legality of the IRS contention.

The Treasury Department solicitor in December 1985 sided with the IRS as the "sounder view of the law" with the spurious reasoning that our treaty language of 1855 should have contained tax exempt language. The first Federal income tax laws weren't passed until 1913.

The Administration witness on S. 727 and H.R. 2792, the Indian Fishing Rights legislation being considered in this 100th Congress to correct these IRS actions, supports the legislation. The IRS Collections Division has agreed, under Senate pressure, to withhold their collection efforts "for a reasonable period of time." The U.S. tax courts keep taking Indian fishermen to court. Who in his right mind can justify such absurdity?

Ninth, tribal self-government with United States support is an essential basic goal of tribal leadership. American Indians will not be able to rid reservations of impoverishment, under-unemployment, high infant mortality, the short life expectancy, or see a rise in educational attainment of our youth or just generally improve economic conditions until such time as Indian people and their governments control their own destinies, territories, and economies.

Indian people need more than a promise of a better future. To overcome the problems will require true self-determination and self-government. This will require eliminating the application of

State and Federal jurisdiction over and above that of the tribal government.

The Indian Self-Determination Act of 1975, P.L. 93-638, was a combination of tribal, Congressional, and executive branch policy to allow tribes to contract from the BIA and IHS to provide direct services to their respective peoples. The BIA and IHS implemented this well-intentioned act by each developing their own separate rules and regulations which addressed their particular agency concerns, extending contracts to tribes with a maze of constrictive rules and regulations and literally increased their influence in tribal government operations.

The S. 1703 Indian Self-Determination Act Amendments of 1987 streamline the tribal contracting process. The Administration proposed demonstration projects offer definite tribal opportunities to function as self-governments, given the willingness of the BIA to transfer resources to tribal governments and reduce their personnel.

Ultimately, a tribal grant in aid approach providing tribal governments the broad range of resources with a minimum of Federal audit and oversight will be required for tribes to begin functioning as unique, sovereign nations.

The current demonstration project concept and future tribal grant in aid must accommodate each tribal government as a unique sovereign nation with a distinct trust relationship. The current Federal practice of addressing all American Indian tribes as having a "Generic treaty and trust relationship" must be replaced by separate government to government relations.

Tenth, the question remains, what is the constitutional relationship between Indians and the Federal Government?

The framers of the Constitution intended that the United States and Indians would remain separate. Article I, section 2, clause 3 excluded Indians from citizenship by the words "excluding Indians not taxed." This clause was reiterated in section 2 of the Civil Rights Act of 1866. It was kept in the 14th Amendment in section 2.

In addition, the words "subject to the jurisdiction thereof" in section 1 of the 14th amendment meant that Indians could not be citizens because they were not totally and completely subject to the jurisdiction of the United States. We were made citizens by the Indian Citizenship Act of 1924, not by tribal request or consent.

The relationship between the U.S. and Indians was to be by treaty, as the President was empowered to negotiate and the Senate to advise and consent under article II, section 2, clause 2. The power to negotiate binding treaties with the Indians was reserved to the Union, and the States were prohibited from doing so by article I, section 10, clause 1.

However, once ratified, the treaties become the supreme law of the land under article VI, section 2. By our own apathy and U.S. aggressiveness, we have become entangled in a political and legal web.

Together, tribes and the United States must initiate a meaningful government to government process to achieve individual tribal self-government. It must be resolved, that a government to government process be initiated through full consultation and mutual agreement with American Indian tribal governments, the executive branch, and Congress to restructure the Federal administration of Indian affairs within this next decade to protect and promote tribal political sovereignty and jurisdictional powers of self-government as originally intended in the U.S. Constitution and confirmed by our treaties.

The Alliance of American Indian Leaders has initiated a proposal to the U.S. Congress which would allow tribal leaders nationwide to explore acceptable approaches to the Federal administration of Indian affairs over the next three years. We plan to offer a manageable range of recommendations for Congressional consideration which would address the broad range of tribal development needs from those tribal governments most dependent on Federal services to tribes seeking self-government and self-sufficiency.

President Reagan's White House Indian policy statement and S. Con. Res. 76 speak of government to government relations. This sounds attractive as policy but in practice has proven most hollow.

Future considerations of tribal government status should include discussions of tribal representation in Congress, cabinet level status for Indian affairs, and other meaningful commitments to ensure we become an integral part of the political process affecting our lives and our tribal membership.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Kinley appears in the appendix.]

[Material to be supplied appears in the appendix.]

The CHAIRMAN. I thank you very much, Chairman Kinley.

Chairman Jourdain.

STATEMENT OF ROGER JOURDAIN, CHAIRMAN, RED LAKE BAND OF CHIPPEWA INDIANS, RED LAKE, MN

Thank you, Mr. Chairman.

For the record, my name is Roger Jourdain. I am Chairman of the Red Lake Band of Chippewa Indians in northern Minnesota, and I am a duly elected official of the Red Lake Band.

Our position has been since before my time with the old aboriginal form of government that they retain the aboriginal status of the land and aboriginal sovereignty as well. And they have exercised this from time to time by refusing allotment, and they told the commission that came there their first day—they had translators—but our chiefs and our warriors never had the benefit of counsel of their own.

However, they had to listen and listen. So, they told them, your mission is a failure when you come to Red Lake. So, they met for seven days, finally, without coming back to Washington and without any result for the Red Lake Band, we had to give up—they bribed them—3 million acres of land with good forest.

Well, the aboriginal lands of the Red Lake Band are very significant as far as we are concerned, and we are proud of the aboriginal status that remains because of the new allotments, we got one block of land, and we had our chief council refuse to have Public Law 280 apply to us. We were excluded from it.

Also, we want to emphasize here and now because of the fight we have been having with the Bureau of Indian Affairs who stated we can overrule the Indian councils. The Indian councils always have their head in the sand.

So, we were determined a few years back to show them that our heads were above the sand in the bureaucracy. So, we came up with the resolution to require passports to enter the Red Lake Reservation, and here is one of the cards that is required by anybody, including the U.S. Marshal, the FBI who destroyed their integrity and credibility with the Red Lake Band several years ago.

So has the Bureau of Indian Affairs destroyed their integrity and credibility with the Red Lake Band. This has been the source of all of our problems.

I was happy to note that those testifying ahead of us were the scholars who have done a lot of research, a lot of time was put in, and I appreciate that because I have a small staff who are doing that every day, seven days a week.

But with the Red Lake Tribal Council, we are going to keep on insisting that we be recognized on a nation to nation basis. When you talk to the solicitors about the status of the Red Lake Tribe, they say well, they had a primitive form of government to begin with. There was nothing primitive about our old Indian councils, as you heard from Chief Oren Lyons and my friend, Mr. Vine Deloria and also the other experts that have done a lot of research on our governments in this regard.

We want to move on forward to have a government to government relationship, as has been stated, also on a nation to nation basis as it was originally intended to be.

So, I am just going to skip along because Joe and Larry have quite a few subjects that we have in our testimony. They have been accumulated for quite some time. They come from the archives of what we salvaged from the Bureau of Indian Affairs' destroying our records.

I would like to destroy the whole staff at the Red Lake agency right now, including the area offices. I have been advocating for over 25 years to abolish the area offices. It is just another red tape station.

Abolish it and reprogram their big budgets back to the reservation where it belongs. We have instant communications today. We can do away with them today by executive order.

But I want to come back to the main subject here of this resolution that you have introduced, Mr. Chairman. We were here on September 17. We were privileged to be here and to participate in your press conference on that resolution.

We have with us several of the council members here today and my staff. I would like to call on them to stand up and be recognized, because they have been the force behind the chairman. Will you please stand up?

The CHAIRMAN. Welcome.

Mr. JOURDAIN. You see, we outnumber those Sioux over there. [Laughter.]

We have to.

You were talking about the ending of the Indian wars. Well, actually, the Chippewas and the Sioux have never signed a peace treaty. We are still legally at war.

And I have been trying to get him involved to write up a peace treaty that we can review. I have one ready for him.

But when Carter and Mondale had Sadat and Begin here for the Camp David Summit meeting and he finally got them to shake hands and be civilized—they are supposed to be civilized— and sign a peace treaty, which they did. He bribed them, of course, Carter did. He gave them each $1 billion.

So, I proposed to Carter and Mondale—I said we want a peace treaty, too, immediately. I said I want a peace treaty with the Sioux Nation. So, we can go out to Camp David, and we can be awarded $1 billion apiece. If they hadn't taken us on faith, we wouldn't be sitting here today. We would be playing bingo with our billion. [Laughter.]

So, those are just some points that I want to make to my friends. We have worked together. I remember the days when he was NCAI director. He was so frustrated, and I watched him develop—I and Wendell and many others of the old-timers, some of whom have fallen by the wayside.

I remember one time in 1967, he got up in this meeting over at the BIA auditorium, and he got mad at all of us. He was sitting way back in the corner. He said I want you chairmen, you councilmen, to get up and talk. What are you sitting there for? He really bawled us out.

So, that is why I respect my friend and colleague, Vine Deloria, and I hope some day that I will issue out a task force to him and have him come back to Red Lake and give us a rip snorting Indian pow-wow speech.

Now, with regard to S. Con. Res. 76, this is the first step of the bail-out for the American Indians. This is a bail-out from the Bureau of Indian Affairs, the Indian Health Service bureaucracy. Not too long ago, you had Black Monday over on Wall Street. Immediately, the White House reacted, Congress reacted with let's get together and see what we can do to bail out Wall Street.

You got it all stabilized. Then, we keep on bailing out foreign governments, the Philippines and now in Central America. We keep bailing them out. They just keep on fighting so they get some more Federal grants without any compliances.

The U.S. Government reconstructed Europe and England after World War I and the Kaiser's destruction. And the United States Government bailed out Hitler's destruction with foreign aid.

Where did the money come from? It came from the Indian lands, from the fish of the Lummis and my forestry money and the resources that were confiscated illegally from us.

But we try to get some attention to get a bail out financially, and everybody says you are getting over a billion dollars, Roger. What are you hollering about? Sure, the Bureau of Indian Affairs' budget. I say they have 90 percent of it.

We want that money on a government to government basis programmed directly to the tribes and by-pass the States who are imposing certain requirements that they act as the conduit for the Federal programs coming to the reservations. They are putting in their little box. Before you can receive this Federal grant through the State, you must agree to the waiving immunity, too. We tell them to go you know where—where they belong.

So, it is time that this be considered in S. Con. Res. 76. It is going to have broad ramifications. Already I see the impact it has.

The Honorable Chairman of this committee, Senator Inouye, has already convened the committee here and set up a special committee to investigate the Bureau of Indian Affairs, the Indian Health Service, and all the Federal programs related to the Indian tribes. We certainly look forward to that, and we want to participate in that investigation.

We have been hollering and hollering about some problems we have had on our reservations, but it took the newspaper to bring it to the attention of everybody, including the religious organizations.

Also, I want to touch on something with regard to the limitations of the plenary power. We don't understand where all this plenary power comes from. I don't. All I know is what I read in the Constitution of the United States and what every Indian scholar has told me and also some of the federally appointed U.S. District Attorneys.

They don't know what is going on. Neither do the Federal judges.

The plenary power, as I understand it, stems primarily from the Supreme Court. I thought that the Supreme Court was to refrain from legislating. They are supposed to be guiding mainly on the intent of the law.

I was listening with a great deal of interest when the Senator was chairing the hearings, when Biden was chairing the hearings, and you were questioning these legal candidates up for Justice of the United States Supreme Court.

Nevertheless, we hope that we can move right on fast and see if we can get this Indian problem, the Indian question straightened out once and for all. I want to give you one example, and then I am going to conclude, one example of what the United States did to the Red Lake Band of Indians.

The 1916 Red Lake Forestry Act passed by Congress authorized the Secretary of the Interior or his duly authorized representative to administer and manage the forests for the Red Lake Band of Chippewa Indians and the saw mills. This is a product of Congress. When our chief didn't have any legal awareness of what was going on as far as their affairs. The Bureau of Indian Affairs covered it all up.

It was done primarily because of the timber interests who got hold of their Congressmen and their Senators to railroad this thing through. It failed in 1915, but they railroaded it through in the 1916 appropriations act.

Today at Red Lake, we are still suffering the consequences of that Congressional act. I would like to see Congress try to make some restitution to those that are oppressed because of some of the Congressional acts that are causing a lot of hardships, not only in Red Lake but all across the country.

We talk about saving the Soviet-United States Government treaty. I was listening to the candidates last night. All they do is pussy-foot around the darn question. I have never seen any leader stand up—from either side of the aisle. I don't know what we are going to do about a leader for the next presidency. Somebody is going to have to come from nowhere, a dark horse probably, but I don't see anybody to provide any hopeful signs for me and the Red Lake Band.

I would like to go on and on, but I am going to conclude with this.

[Prepared statement of Mr. Jourdain appears in the appendix.]

The CHAIRMAN. Thank you very much, Chairman Jourdain.

I believe there are 252 tribes and nations certified and recognized by the American Government and approximately 270 villages and corporations in Alaska. I think those statistics should be kept in mind, because I have found in the last 10 months that often when Indians speak, they just speak for themselves.

I have yet to hear Indians speak in one voice, even on major issues. They eloquently express their concerns to this committee, but they haven't, I think, realized that in the last 200 years, the Congress has played an extraordinary role in the destiny of Indian nations. We have made laws that have placed you in jeopardy. We have made laws that have resulted in the diminishing of the numbers of Indians.

Yet, I find that very few Indian nations and tribes maintain relationships with their Senators and Representatives. What you see here is a good example.

If some constituent of mine in Hawaii told me that a hearing was being held this morning where he would be most pleased with my attendance, I would not be sitting here. I would be willing to bet that none of you communicated your concern to your Senators or that they be present here on this occasion.

This is what I am talking about, the scale of power and influence. I realize that it is very difficult for Indian nations and tribes that have lived all these years with different cultures and languages and history to combine, but if you are to live in this century with this Congress, then I think you better learn to live with your Senators and Representatives.

I got on this committee, it may interest you to know, because there was an opening, and nobody wanted to serve. I am on the Steering Committee as a member of the leadership of the Senate. When nobody came forward to fill that vacancy, the committee looked at me and said why don't you serve on it, and that is how I got on. That shows the level of interest in the Congress.

I am certain all of you know that only recently there was an attempt to do away with this committee. In the House of Representatives, there is no Indian committee. It is a subcommittee. It is not a special committee.

Up until now, up until last year, this committee had no hearing room. For the first time in our history, we have a hearing room assigned to us.

It may interest you to know that the Rules Committee has approved an appropriation of $724,000 for the Special Committee on Investigations. When one looks at the amounts of moneys that have been set aside for investigation in the Congress, you will find that this is one of the largest amounts that has been approved, the largest being, this year, the Iran committee. I think next to the Iran committee, this special committee has the largest appropriation.

That is how seriously we are taking this. I would hope that the leadership of the Indian nations would look about them and maybe learn the realities of American political life and get to know their Representatives and Senators and begin to learn how to exert some influence. Then you will have a full array of Senators here.

But if you don't take the time to express your concerns and your interest to your Senators, they won't attend. They have other commitments where the pressures are greater.

So, your presence here is very important because you represent the leadership of all Indian nations, and I would hope that you would pass it on. Hopefully, some day, you will concern yourselves not only with your problems.

I think all Indians should be concerned with what is happening to Sohappy for taking 36 salmon, 5 years in prison. You can murder someone now and get out in 1 year. But 36 salmon and you have already served nearly 3 years?

I think all of you should be speaking with one voice.

Recently, there was a grossly inappropriate intrusion and raid in the offices of the Crow Nation, but only the Crows have complained. I have yet to hear other nations complain about this intrusion. If it can happen to the Crows, it can happen to any one of you.

So, I think you better start getting together.

Next week, I will be meeting privately with the two leaders of the Hopi and the Navajo Nations and telling them it is about time they sign a peace treaty. It may sound facetious, but that is the one the gets publicity, the division among the ranks.

So, I wish you the best, and you can count on my assistance. Thank you very much.

Mr. JOURDAIN. Thank you, Senator.

The CHAIRMAN. Our final panel consists of the Executive Director of the National Congress of American Indians, Ms. Suzan Harjo, and an attorney in Washington, Mr. Reid Peyton Chambers.

Suzan, it is always good to see you.

STATEMENT OF SUZAN HARJO, EXECUTIVE DIRECTOR, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC

Ms. HARJO. Thank you, sir.

Once again, you have demonstrated extraordinary patience and leadership, and you certainly have become not only the rudder in Congress for our issues, but the sails and sometimes the entire vessel for this sometimes sorry ship of state.

I am glad that you mentioned the farm credit legislation, and I wish you well in your endeavor this afternoon. I appreciate what you said about Indian people communicating with their Members of Congress.

This afternoon is certainly an important time for Indian people to do that, because, as I understand it, Senator Melcher is going to call for a vote on your amendment, which is so important to pass, and he is siding with Senator McClure in this misguided effort to tax Indian resources. This would be the first time Congress has allowed that to happen, if that happens. I hope that everyone here will leave this hearing and talk with Members of Congress about what will be going on on the floor of the Senate this afternoon.

NCAI, while not specifically passing a resolution to support this resolution, certainly by its entire history is in support of your effort here.

It has been glorious to hear today history not being rewritten, but being perhaps written for the first time. The Indian people have been written out of history, written out of public education, and written out of the American psyche, except for that same old movie that runs through everyone's head where the Indians are the bad guys or the Indians are the mystics who walk on water, and even a benign stereotype is a stereotype and not one to be taken as valuable substitute for substance.

Your resolution is so valuable in combatting the growing era of anti-Indian racism that we are engaged in now, because it can begin to instruct ordinary American people about the nature of Indian rights and the nature of Indian history, and the nature of Indian existence today and the needs that we have.

In the third whereas, the words "sovereign status of Indian tribes" are used. That is such an important concept to get across to the American people, most of whom do not even have the word "sovereign" in their vocabularies. The sovereignty of Indian nations flows from the people as they are acting for the betterment of the nation; not, as with the European model, where sovereignty flows from God, so they say, to the king to some of the people some of the time.

This is perhaps the best evidence of the United States model of democracy being taken from Indian nations, because of this basic concept that was adopted that was so foreign to European thinking. We see the difference between the United States and Canada—Canada, which did adopt the British model of divine right of kings, rather than the Indian model of rights of the people for the good of the people.

This concept is important to develop as legislation. If Indian nations are nations, if Indian nations are sovereign—and, of course, we are—then it should not be within anyone's power outside that nation to impose something on that nation without the consent of the people affected. I believe that we need to write that into every law and to make it clear in the context of this resolution, because this resolution will become law.

The last great resolution of the Congress regarding Indian rights was the American Indian Religious Freedom Act of 1978. As has been discussed here earlier, since that fine and noble recognition of Indian religious rights, and the less than noble abridgement over the centuries of white contact of those rights, little has been done to implement that act.

It was viewed by the Federal bureaucracy as something that didn't really affect them, because it didn't carry appropriations. It didn't carry money. It didn't carry a program, or a door, or a title over a door, or a staff, or turf.

A very basic right is embodied in that resolution. In very few treaties will you find the word "religion" used. Yet, every treaty meant religious liberty. It was so basic it was never discussed or seldom discussed.

We need something that will make a practical difference in people's lives, and this resolution is a very good start. We need a declaration requiring the Justice Department, for example, to declare itself as to who it is representing when it is representing Indian peoples, to expand the concept of conflict of interest to mean that the Federal Government, if it represents Indian people in court, represents Indian people or an Indian nation at the will of that person or nation, not just as it thinks best for that person or that nation.

That is something that could be accomplished now and fairly easily. It could be accomplished administratively. It will not be. It must be imposed by Congress for there to be a declaration of trust at each juncture of litigation.

We need, of course, to stop the Administration from imposing taxes on Indian fishery income, as you are working to do, and for Congress to police itself, as you are working to do, to stop Congress from taxing trust land.

We need to stop having Congress take actions on appropriations measures that continue to do great damage over time to Indian peoples. It was an appropriations rider through which the United States inhibited its power to make treaties with Indian nations. It did not inhibit the Indian nations' power to make treaties with others or each other, just inhibited itself.

It was through an appropriations rider that State courts gained jurisdiction over Indian water rights in certain circumstances and have caused through that McCarran Amendment of the early 1950's great damage to Indian nations.

It was through an appropriations rider that the last remaining traditional medicine fields of the Cherokee Nation were flooded and the burial grounds containing Sequoia's graves were flooded to build Telico Dam with the simple introductory phrase that we have come to know so well, "notwithstanding any other provision in law."

It was in the context of appropriations that the starve or sell policies regarding the Black Hills and the Sioux people were first articulated. That was in the context of debates on appropriations.

And the absence of Congress saying what it means has given us, through the courts and through the Federal bureaucracy, contorted concepts of trust, contorted concepts of the plenary power. Plenary power meant *with regard to* Indian affairs, not *over* Indian affairs, and has come to mean an imposition on the tribes and a parenting of the tribes, rather than a restriction of the several States in their actions regarding Indian tribes.

The trust itself grew out of promises of the United States to protect Indian peoples against encroachment by the States and by individual non-Indians, and that has been contorted to mean something quite different. We hear now the Secretary of the Interior and the Assistant Secretary for Indian Affairs saying, "we want to define the trust, we want to know what the trust is and, more importantly, what it is not".

Well, we know what they think it is not. They mean anything that is good for Indians is not what the trust is, according to them.

Congress needs to end the damage that the BIA is doing, and I think this investigative body is a good first step, and provide some work orders to the BIA. Get them to do easement accountings, resource inventories. Get them to do financial accounting reconciliations—the very basics. If they are going to be a Federal resource manager, let them behave like one that is competent.

Congress needs to add that it is the breakdown of Federal policies which affects Indian peoples and Indian nations today through the Federal acknowledgement project and take control again of that prerogative of Congress to recognize Indian nations as far as who has a U.S. relationship.

The only specific comment I would have on the resolution itself as to wording is in the sixth and final whereas, item number 3, the next to the last line, where Indian people are referenced as "members." This, like nationhood, like sovereignty, is a most important concept. Words do have a meaning, and we need to stop using the term "members" as with the Elks Club or the Moose Club, and look to use the word that is proper. The word that is proper is "citizenry" or "citizens."

That clarifies that it is a political matter that we are discussing and takes it even further away from the criticism that some of the non-Indian people have that Indians are racially privileged. We are political distinct, and we need to use terms that clarify that distinction and also do not demean the status. We are first citizens of our Indian nations and then citizens of the United States, if we so choose to be.

I would just like to once again thank you for initiating this, for bringing the Senate and the Bureau of Indian Affairs into this century by reviewing past centuries, and I will have you in my thoughts and prayers this afternoon as you carry on the fight on our behalf on the floor to prevent further encroachments by the United States and by the States and local governments into Indian territory and Indian lives.

Thank you.

The CHAIRMAN. I thank you very much.

Mr. Chambers.

STATEMENT OF REID PEYTON CHAMBERS, ESQ., WASHINGTON, DC

Mr. CHAMBERS. Mr. Chairman, let me first thank you and the committee for the honor of being included on a panel with Suzan on this bill and with the distinguished and eloquent witnesses that have preceded me, and let me try to repay the kindness in some small way by promising to be brief. I know I am the last speaker of the day, and for both you and those who have stayed, I shall summarize my statement.

I will not go into the origins of the trust responsibility which S. Con. Res. 76 reaffirms. I will discuss three modern aspects of the trust responsibility that I think it is important to bear in mind.

The first, of course, is the property related aspects of the trust. The trust responsibility protects water rights. Chairman Chino could not be here today, because he is protecting them out in New Mexico. It protects the right to hunt and fish of the Northwest Tribes, of Chief Kinley, Chief DeLaCruz. It protects, of course, the timber resources of Chief Jourdain. And it protects the land.

The courts have been very clear in saying this is not an ordinary trusteeship. The United States has the highest moral duties of responsibility in trust, is bound by every moral and equitable consideration to discharge its trust in good faith and fairness. That is not me speaking; that is the United States Supreme Court speaking unanimously.

Now, I don't need to tell you, Mr. Chairman, or the other witnesses or the spectators here, that the United States has not been true to that trust. It hasn't been true to it in 1916 with Chairman Jourdain's forest. It hasn't been true to it in 1987, either.

Obviously, in one sense, reaffirming the trust responsibility might seem unnecessary, in the sense that the trust responsibility exists whether the Congress reaffirms it in this resolution or not. But I think it is very important to reaffirm it nonetheless, because it is important to send the message that all the witnesses have been asking you to send to the Federal executive.

And it is time once again, as in the administration of President Carter, as in the administrations of Presidents Johnson and Nixon and Ford, a long bipartisan continued policy, for the Federal executive to serve as an advocate for Indian trust interests and to protect those interests.

There are scores of suits now in the Federal courts brought by the Federal Administration as trustee for Indian rights, but this Federal Administration has not brought many of those suits. This Federal Administration has not served as a vigorous advocate for Indian property interests it holds in trust.

There are also two other aspects of the trust responsibility that I think it is important to bear in mind. One is the responsibility of the United States as a trustee to protect Indian governmental authority. I believe, Mr. Chairman, if you go into the origins and the history of the trust responsibility, that is the core. That is the heart and soul of the trust responsibility.

Others have spoken of Chief Justice Marshall's decision in the *Cherokee Nation* cases. The trust responsibility in those cases, while it protected land, it was protecting land in order to protect sovereign rights, the rights of the Cherokee Nation to function as a distinct political society.

Mr. Chairman, Suzan Harjo referred to the testimony of the Secretary and Assistant Secretary about 1 month ago before Congressman Yates' subcommittee about the trust responsibility. They seemed most concerned about protecting the United States from liability, and protecting Indian tribes from making mistakes in the property related aspects of the trust responsibility. Mr. Chairman, I suggest that is not at all the purpose of the trust responsibility.

The purpose of the trust responsibility is to protect Indian lands, Indian resources, Indian rights of subsistence, to hunt and fish, to minerals and others, to water, to develop those lands—so that the Indian tribes can function as a distinct political society. There is, I submit, no conflict between a policy of self-determination and the trust responsibility, because the purpose of the trust responsibility is to nourish and further tribal self-determination. That is its highest purpose. I suggest, Mr. Chairman, that by passing this concurrent resolution, the Congress send a clear message to the Federal executive that there is not the conflict that some perceive between those two policy objectives.

The third aspect of the trust relationship, I suppose, is the most amorphous, but I think it is as important as the other two. Professor Deloria was talking earlier about the plan to move the Sioux Tribes to Oklahoma after Wounded Knee and enclose them in barbed wire and keep them there until they assimilated.

Well, that is not the trust responsibility. That would be the grossest breach of trust. The trust responsibility promised that by incorporating the Indian tribes into this American commonwealth that they would receive the same services as other citizens, as Suzan is saying, of the country.

Perhaps they should have received more. One could argue that after having taken the Indian lands, the 500 million acres that you were talking about earlier this morning, that the United States should have provided more services to the Indians than to other groups in the American commonwealth. But at least the same services, the same magnitude, the same economic development, the same health care, the same education, should be provided.

That is a part of the trust responsibility. That is what was assumed by the United States when those lands were ceded to the United States.

It is not in any formal document, but then no formal document talked about the Winters Doctrine water rights. This was the implicit promise of the trust responsibility. I don't need, of course, to tell the committee that that hasn't been fulfilled. But at the very least, American Indians on reservations should receive services, should have programs that are comparable, should have economic development that is comparable, to rural non-Indian America. This has never happened. It has been done in few if any places in this country, and it is an unfinished business of the United States. By reaffirming the trust relationship, again, this committee can take leadership and the Congress can take leadership of the administration of the trust responsibility for the Indian people of the country.

So, I commend you, Senator, for introducing the bill. I urge its speedy passage, not because it is legally necessary, but because it is morally necessary to reaffirm this responsibility. It is not a new policy, and no new policy is needed. It is the old policy needs to be reaffirmed and needs to be carried out so that the promise, finally, for the Indian people of this country of this relationship, this unique relationship, between these two peoples, the Indian nations and the United States shall be fulfilled.

Thank you again, Mr. Chairman, for including me in this distinguished group of witnesses.

[Prepared statement of Mr. Chambers appears in the appendix.]

The CHAIRMAN. I thank you very much, Mr. Chambers, and thank you very much, Suzan.

Without objection, the word "members" appearing in the resolution on page 3, line 19, will be amended to read "citizens."

Ms. HARJO. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to announce that the record of these hearings will be kept open for two additional weeks. So, if any one of you would like to expand upon your statements or insert new statements, please feel free to do so.

With that, I would like to express the gratitude of this committee for spending time with us today. You have been extremely helpful. Thank you.

The committee stands adjourned.

[Whereupon, at 12:36 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

TESTIMONY OF DR. GREGORY L. SCHAAF
ETHNOHISTORIAN FOR THE ONEIDA NATION
FOR SENATE CONCURRENT RESOLUTION 76

SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
DECEMBER 2, 1987

Gregory Schaaf, Ph.D.
Ethnohistorian
c/o John Patterson
Box 1, West Road
via Oneida, NY 13421
(315) 697-8251
November 24, 1987

Senate Select Committee on Indian Affairs
Mr. Michael Mahsetky
Staff Attorney
838 Hart
Senate Office Building
Washington, DC 20510

ATTENTION: Kimberly Craven

Dear Mr. Mahsetky:

SUBJECT: Written testimony in support of concurrent resolution 76

In response to my recent telephone conversations with Ms. Kimberly Craven I respectfully submit the enclosed written testimony in support of Concurrent Resolution 76. Furthermore, you will find enclosed a supporting resolution which passed unanimously by the Nation Indian Education Association.

I understand my verbal testimony will be during the hearings scheduled on December 2, 1987, 9:00 am - 12:00 noon, at Room 485 in the Russell Building.

Thank you for your time and consideration.

Sincerely,

Gregory Schaaf, Ph.D.

Gregory Schaaf, Ph.D.
Ethnohistorian

Enclosures

Passed Unanimously on October 30, 1987 by National Indian Education Association

OKLAHOMA COUNCIL
FOR INDIAN EDUCATION

RESOLUTION OF THE NATIONAL INDIAN EDUCATION ASSOCIATION
87__

To Acknowledge American Indian Influences on the Constitution of the United States of America

WHEREAS, the original framers of the U.S. Constitution are known to have greatly admired the concepts, principles and governmental practices of American Indians; and

WHEREAS, the confederation of the original thirteen colonies into one Republic was explicitly modeled upon the Haudenausaunee (Iroquois) and other American Indian confederacies; and

WHEREAS, many of the democratic principles of the Great Law of Peace were directly incorporated into the U.S. Constitution; and

WHEREAS, Senator Daniel Inouye and 13 other members of Congress have introduced Senate Concurrent Resolution 75 to recognize American Indian contributions to the U.S. Constitution and to reaffirm the continuing government-to-government relationship between Indian nations and the United States established in the Constitution;

NOW, THEREFORE BE IT RESOLVED BY THE MEMBERS OF NIEA ASSEMBLED, THAT:
(1) We honor our ancestors for their wisdom in establishing sovereign, independent nations founded to preserve the natural rights of future generations.
(2) We strongly recommend that educators revise curricula to teach students original American Indian ideas, principles and ways of life which directly influenced the U.S. Constitution.
(3) We urge the U.S. Congress to act during the Bicentennial of the U.S. Constitution to pass Senate Concurrent Resolution 75, thereby recognizing the powerful influence of American Indian thinking of unity, diversity and the strength of the people by enriching the circle.

INTRODUCTORY NOTE

This study, which compares the Haudenausaunee (Iroquois Confederacy) Great Law of Peace and the U.S. Constitution, is an excerpt from an upcoming book written by Gregory Schaaf, Ph.D., The Morgan Papers: War and Revolution -- Peace and Friendship (to be published in 1988). The "Morgan Papers" are a collection of original, previously unpublished letters and manuscripts written by George Washington, Thomas Jefferson, John Hancock. . .and most importantly the private journal of George Morgan. He was the first Indian Agent for the Continental Congress who helped record the first U.S. - Indian Peace Treaty in 1776. His journal preserves speeches on the subjects of war and peace expressed by the head chiefs, councilors, clan mothers for the people and women leaders from over thirty Indian nations.

The "Morgan Papers" were discovered by Dr. Schaaf in 1976 in the possession of the Morgan family who had kept the documents private for six generations. The collection served as the focus of a doctoral dissertation written by Gregory Schaaf under the supervision of Dr. Wilbur Jacobs, Professor of History at the University of California at Santa Barbara. Articles about the "Morgan Papers" have appeared in the New York Times, London Times, People Magazine and National Geographic magazine.

A condensed version of the comparison entitled, The Great Law of Peace and the Constitution of the United States of America (Canal Press, 1987) has been printed with illustrations by Mohawk Artist John Fadden as a special edition for the Tree of Peace Society. This society is dedicated to planting trees as symbols of peace around the world. They have been invited to conduct a special planting ceremony in September, 1988 on the Mall in Washington, D.C., as part of the official Bicentennial of the Constitution activities. These planting ceremonies are conducted in rememberance of the Great Peacemaker who delivered the original Great Law of Peace. He inspired the warriors to bury their weapons of war beneath the Tree of Peace, perhaps the oldest effort for disarmament in world history. Trees of Peace have been planted at the state capitols in California and New York, part of an effort to plant trees at every state capitol and school in the country.

In making the direct comparisons between the Great Law and the Constitution, an effort has been made to keep each parallel section side-by-side. As a result of one side being shorter or longer, the remaining white space has been filled with an enlarged, selective quotation inside a box. These selective quotations may appear on either column at random as space was available. The result is a series of highlighted quotes to give the reader an overview of the main points.

Now that the direct influence of American Indians on the U.S. Constitution and the democratic structure of government has been documented, the task remains to write new curriculum materials for each grade level within our school system. In time, all Americans may gain a new appreciation for the roots of democracy and the special contributions of the Original People of this land.

Chapter 10

"The Birth of Frontier Democracy from an Eagle's Eye View: The Great Law of Peace to The Constitution of the United States of America"

by Gregory Schaaf, Ph.D.

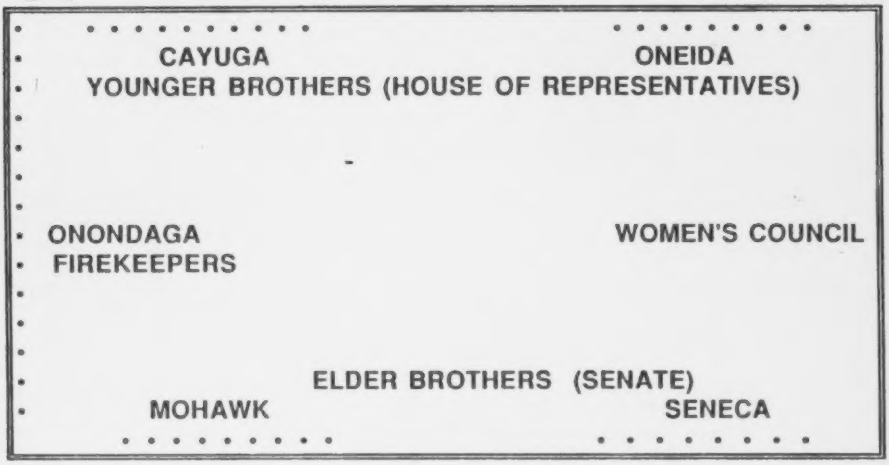
From the time of the signing of the Declaration of Independence to the ratification of the U.S. Constitution, the opportunity to create and to establish a new government challenged people to search for the roots of democracy. One of the little known secrets of the Founding Fathers is the fact that they discovered a democratic model *not* in Great Britain, France, Italy, nor any of the so-called "cradles of civilization." Thomas Jefferson, Benjamin Franklin and others found the oldest participatory democracies on earth among the American Indians.[1]

Representatives of the U.S. Congress met privately with ambassadors from the Haudenausaunee, Six Nations Confederacy, as well as the Lenni Lenape, Grandfathers of the Algonquian family of nations. For centuries these American Indian people were governed by democratic principles. Through wampum diplomacy, their traditional philosophy of liberty was advanced in a series of peace talks focused on the law of the land, the balance of power and the rights of the people.[2]

American Indian Agent George Morgan and others served as intermediaries in these talks. His role as a diplomat demanded an intimate knowledge of the cultures, social structures and governments of the American Indians. He traveled safely through Indian communities and met with Indian leaders of frontier democracies. He witnessed societies where people were endowed with the right to speak freely, the right to assemble, religious freedom, as well as the separation of governmental powers into three branches.[3]

A system of checks and balances was firmly in place like the branches of the great "Tree of Peace" among the Haudenausaunee, "People of the Longhouse." The United States government was structured surprisingly similar to their Grand Council.[4]

Seating Pattern of Iroquoian Grand Council


CAYUGA
ONEIDA
YOUNGER BROTHERS (HOUSE OF REPRESENTATIVES)
ONONDAGA
FIREKEEPERS
WOMEN'S COUNCIL
ELDER BROTHERS (SENATE)
MOHAWK
SENECA

The Onondaga, led by Tatadaho the Firekeeper at the heart of the Confederacy, paralleled the presidency of the executive branch. Their legislative branch was divided into two parts. The Mohawk and Seneca, united as Elder Brothers, formed the upper house of the traditional Senate. The Oneida and Cayuga, joined in 1710 by the Tuscarora, composed the Younger Brothers, similar to the House of Representatives.[5]

After meeting with representatives of the Six Nations in the summer of 1754, Benjamin Franklin first proposed the creation of a colonial Grand Council in the "Albany Plan of Union":

> "one General Government may be formed in America. . . administered by a president General...and a grand Council to be chosen by the representatives of the people of the several colonies. . ."[6]

Franklin's plan for a Grand Council of United Colonies clearly resembled the Grand Council of the united Iroquois Six Nations.

Why did the Founding Fathers choose to keep secret the original design of the United States government? One clue may be related to a major difference between Iroquoian vs U.S. judicial branches. The Iroquoian Supreme Court was entrusted to the women. Clan Mothers and Women's Councils maintained a balance of power in their matrilineal society. Women nominated chief statesmen as political and religious leaders, lending a maternal insight into good leadership qualities. Their standards were set very high. While under the U.S. Constitution, qualifications of Congressmen were limited to age, citizenship and residency, Iroquoian women moreover required:

> All royaneh [Chief Statesmen] of the Five Nations must be honest in all things. They must not idle or gossip, but be men possessing those honorable qualities. . .Their hearts shall be full of peace and good will and their minds filled with a yearning for the welfare of the people of the Confederacy. . .[7]

Women also held the power to impeach any leader who failed -- after three warnings -- to serve the best interests of the people. If the Founding Fathers had disclosed the political powers of many Indian women, perhaps women like Abigail Adams, wife of future President John Adams, could have effectively assumed positions as "Founding Mothers." White women could have argued they deserved, at least, equal rights with American Indian women.

In behalf of the people, women preserved title to the land through families and clans. This may be another facet of the Iroquoian system which some Founding Fathers may have preferred not to make public. In contrast, women in the United States were not permitted the right to own land, nor even to vote, much less control over the system of justice. Iroquoian women also maintained a sort of veto power to stop wars. If women across the land had known the truth about the power of Indian women, the call for equal rights could have been heard earlier, and American history might have changed over the past two hundred years.[8]

Two generations ago, Dr. Paul Wallace, a respected ethnohistorian in Iroquoian and Algonquian studies, traced the The White Roots of Peace to the original sources relating how the first "United Nations" was born.[9] When I retraced these roots to Onondaga and then to Mohawk, I was impressed by a stone monument to Dr. Wallace which stands before the Akwesasne Mohawk Longhouse. On the top was engraved the Tree of Peace followed by these words:

TO AMERICA'S OLDEST ALLY
THE IROQUOIS CONFEDERACY
"PEOPLE OF THE LONG HOUSE"
MOHAWKS, ONEIDA, ONONDAGA, CAYUGAS,
SENECAS -- TO WHOM WERE LATER ADDED
THE TUSCARORAS CONSTITUTING
THE SIX NATIONS
FOUNDED BY DEGANAWIDAH AND HIAWATHA WHO
PLANTED THE TREE OF PEACE AT ONONDAGA (SYRACUSE)
SOMETIME BEFORE THE COMING OF COLUMBUS.

THEY EXCELLED IN STATESMANSHIP AND THE ART OF DIPLOMACY. AFTER THE WHITE MAN CAME, DURING MORE THAN A CENTURY OF INTERCOLONIAL STRIFE, THEY LOYALLY PROTECTED THE INFANT ENGLISH COLONIES, SHOWED THEM THE WAY TO UNION, AND SO HELPED PREPARE THE AMERICAN AND CANADIAN PEOPLE FOR NATIONHOOD.

IN MEMORY OF OUR BELOVED BROTHER
TO-RI-WA-WA-KON (Dr. PAUL A. WALLACE)
WHO, THROUGH HIS WRITINGS, SHOWED THE
IROQUOIS CONFEDERACY AS IT TRULY EXISTED.
THANK YOU,
TORIWAWAKON, FOR YOUR GREAT WORK.[10]

Toriwawakon literally means, "He Holds the Matters," which implies that he held in his hands matters related to the core of Iroquoian society.

Dr. Wallace began the story by recognizing the Iroquois as the "famous Indian confederacy that provided a model for, and an incentive to, the transformation of the thirteen colonies into the United States of America."[11] Over a thousand years ago, according to Iroquois faithkeepers, a Great Peacemaker emerged at the time of a terrible war. He inspired the warriors to bury their weapons of war beneath a sacred Tree of Peace. An eagle soared from the heavens, perched on top of the tree and clutched the arrows to symbolize the united Indian nations. (The U.S. national seal, pictured on the back of the one dollar bill, features 13 arrows for the 13 original United States.)[12]

The Haudenausaunee have preserved a story of the origins of the Tree of Peace. At the planting of a Tree of Peace at Philadelphia, Chief Swamp explained through interpreter Chief Tom Porter:

> In the beginning of time, when our Creator made the human beings, everything needed to survive in the future was created. Our Creator asked only one thing -- never forget to be appreciative of the gifts of Mother Earth. Our people were instructed how to be grateful and how to survive. But at one time, during a dark age in our history perhaps over 1000 years ago, human beings no longer listened to the original instructions. Our Creator became sad, because there was so much crime, dishonesty, injustice and so many wars. So our Creator sent a Great Peacemaker with a message to be righteous and just and to make a good future for our children seven generations to come. He called all the warring people together, and told them as long as there was killing, there would never be peace of mind. There must be a concerted effort by human beings -- an orchestrated effort -- for peace to prevail. Through logic, reasoning and spiritual means, he inspired the warriors to bury their weapons (the origin of the saying to "bury the hatchet") and planted atop a sacred Tree of Peace.[13]

Upon hearing this story, Dr. Robert Muller, former Assistant Secretary General of the United Nations, responded, "This profound action stands as perhaps the oldest effort for disarmament in world history."[14]

The Peacemaker provided the people with a code of justice called the *Great Law of Peace.*[15] His vision embraced all the people of the world joining hands in a way of life based on the principle that peace is the law of the land. He created a united government which still meets around the council fire at Onondaga, near present-day Syracuse, New York.

The rights of the people, according to Onondaga Faithkeeper Oren Lyons, include, "freedom of speech, freedom of religion, and the rights of women to participate in government. The concept of separation of powers in government and of checks and balances of power within governments are traceable to our constitution. These are ideas learned by the colonists. . ."[16]

Over 200 years ago an Onondaga chief advised Benjamin Franklin and other colonial representatives, "Our wise Forefathers established Union and Amity. . .this made us formidable. . .We are a powerful Confederacy, and if you observe the same methods. . .you will acquire fresh Strength and Power."[17] Franklin challenged the colonists to create a similar united government:

> It would be a strange thing if (the) Six Nations. . .should be capable of forming. . .such a union. . .and

> yet a like union should be impracticable for. . .a dozen English colonies.[18]

The result of Franklin's challenge was the creation of the United States of America with a Bill of Rights and Constitution based on the *Great Law* as symbolized by the Tree of Peace.

In fact, the first U.S. - Indian peace treaty in 1776 took place beneath a Tree of Peace, as documented in the *Morgan Papers*, the documents of the American Indian agent who recorded how the elders tried to promote peace during the Revolutionary War.[19] In the spring of 1776, the Continental Congress decided to retrace the White Roots of Peace by appointing the first Indian Agent, George Morgan, to promote peace among the Indian nations.[20] John Hancock, the President of Congress, instructed Morgan to take a "great peace belt with 13 diamonds and 2,500 wampum beads," following the custom of the Peacemaker when inviting the Indians to attend the first U.S. - Indian Peace Treaty.[21] The details of the wampum diplomacy -- which featured the philosophical roots of the *Great Law of Peace* and the U.S. Constitution -- came to light with the discovery *Morgan Papers*.[22] Found in an old trunk in the attic of 94-year-old Susannah Morgan, the collection features original documents by George Washington, Thomas Jefferson, John Hancock and Morgan's private journal which prove the Iroquois Confederacy advocated peace and neutrality early in the Revolution. To symbolize the American promise that Indians would never be forced to fight in the wars of the U.S. and that Indian land rights would be respected, the American Indian Commissioners presented the chiefs and clan mothers with the 13 diamond wampum belt. Symbolically, the war hatchet was then buried beneath the Tree of Peace, and prayers of peace were offered through the sacred pipe.[23]

The Tree of Peace thus became the Tree of Liberty, and the Eagle atop clutched 13 arrows for the 13 states. While the Iroquois shared the Peacemaker's plan for creating a strong united government which influenced the U.S. Constitution, Washington also wanted Iroquois men to fight in the war and Iroquois land for American expansion. The Six Nations were forced to take a stand for their own freedom and liberty.[24]

Based on the *Great Law of Peace*, the Peacemaker founded a participatory democracy in which the people have the right to actively participate and to determine their own future. The Iroquois Constitution laid the foundation for a government of the people with three branches. The democratic government of the Lenni Lenape, Grandfathers of the Algonquian family of nations, also guaranteed freedom of religion, freedom of speech, and freedom of assembly long before these rights were extended to American citizens.[25] As acknowledged in the writings of Benjamin Franklin, George Morgan and other founding fathers, frontier democracy clearly influenced the framers of the U.S. Constitution.

Iroquoian elders have long claimed their government served as a model for the United States. To put their tradition to a test, appropriate passages from the *Great Law of Peace* have been positioned side-by-side with the Constitution of the United States of America. The results proved striking. The parallels are unmistakable. Moreover, the differences proved even more interesting. Featuring high qualifications for leadership, political rights for women and a remarkable system of justice, the *Great Law of Peace* may inspire people to reconsider the founding principles of America's origins.

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[1]. Two main schools of thought have dominated scholarly interpretation. The Imperial school looked east primarily to British institutions and French philosophy by Rousseau, Locke and others. The Frontier school, led by Frederick Jackson Turner, looked west to sectional influences. This study draws a focus on the influence of American Indians, particularly the Iroquoian and Algonquian nations known collectively and the Eastern Woodland cultures.

[2]. Transcripts of meetings between the U.S. and Indian ambassadors during the American Revolution were compiled by John P. Butler, Index: The Papers of the Continental Congress: 1774-1789 (Washington, D.C., 1978), v. II.

[3]. George Morgan's eyewitness account of Indian Affairs during the American Revolution is the topic of a manuscript soon to be published by ~~Gregory Schaaf~~, (~~1987~~). the author.

[4]. The "Seating Chart" of the Grand Council is illustrated in Mike (Kanentakeron) Mitchell, Barbara (Kawenehe) Barnes, eds., et. al., Roy Buck, "The Great Law," Traditional Teachings (North American Indian Traveling College, Cornwall Island, Ont., 1984), p. 37. The chart was developed by the author to include the Women's Council. The comparison with U.S. branches of government was first explained to the author by the late Onondaga historian, Lee Lyons.

[5]. For an introduction to the founding of the confederacy see the accounts compiled by Seneca scholar, Arthur C. Parker, "The Constitution of the Five Nations or the Iroquois Book of the Great Law," (Albany, N.Y., April 1, 1916), No. 184, 175 pp. (hereafter cited Parker, Great Law)

[6]. Benjamin Franklin, "Albany Plan of Union," (Albany, N.Y., July 10, 1754), Queen's State Paper Office; British Museum, London, "New York Papers," Bundle Kk, No. 20, edited by E. B. O'Callaghan, (Albany, N.Y., 1855), v. VI, pp. 853-92.

[7]. Seth Newhouse, Mohawk, edited by Albert Cusick, Onondaga - Tuscarora, "The Council of the Great Peace: The Great Binding Law, Gayanashagowa," Wampum 27, originally coded 45-XLV, Tree of the Long Leaves (TLL), printed in Parker, Great Law, p. 38.

[8]. The Women's suffrage movement finally succeeded in establishing the XIX Amendment to the U.S. Constitution, certified August 20, 1920, "The right of citizens of the United States to vote shall not be denied or abridged by the

United States or by any State on account of sex. Congress shall have the power to enforce this article by appropriate legislation."

[9]. Paul Wallace, *The White Roots of Peace* (Philadelphia, 1946, reprinted by Chancy Press with prologue by John Mohawk and illustrated by Kahionhes, John Fadden, 1986). (hereafter cited Wallace, *White Roots*)

[10]. According to Mohawk Chief Jake Swamp, the monument was designed by Tehanetorens, Ray Fadden, the Mohawk senior historian who established the Six Nations Indian Museum, Onchiota, N.Y.

[11]. Wallace, *White Roots*, p. 3.

[12]. Dr. Donald Grinde and Paula Underwood Spencer, two scholars presently researching parallels between the Great Law and the U.S. Constitution, mentioned to the author that a document has been found in which Jefferson made notations regarding the symbolic origins of the bundle of arrows.

[13]. Chief Jake Swamp (translated by Chief Tom Porter), "The Origins of the Tree of Peace" (Friends Meeting Hall, Philadelphia, October, 1985), tape 1, side 1, transcribed by Mary Beth Miller.

[14]. Dr. Robert Muller, "A Vision of Peace," foreword to ~~Gregory Schaaf~~ the author's work, *The Morgan Papers: War and Revolution -- Peace and Friendship* (1987).

[15]. There are six versions of the *Great Law of Peace* and the founding of the Iroquois Confederacy:

1. *The Newhouse version*, gathered and prepared by Seth Newhouse, a Canadian Mohawk, and revised by Albert Cusick, a New York Onondaga-Tuscarora. This version has been edited by Parker, *Great Law*. Parker explained his system of footnotes as follows: "The abbreviations after each law refer to the sections in the original code and their numbers. **TLL**, means Tree of the Long Leaves; **EUC**, Emblematical Union Compact, and **LPW**, Skanawita's Laws of Peace and War. The first number in Roman numerals refers to the original number of the law, the second number, in Arabic numerals, to the section number in the division of the law named by the abbreviation following."
2. *The Chiefs' version*, compiled by the chiefs of the Six Nations Council on the Six Nations Reserve, Ontario, 1900. This version appears in the "Traditional History of the Confederacy of the Six Nations," edited by Duncan

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C. Scott, Proceedings and Transactions of the Royal Society of Canada (Ottawa, 1911), v. 5.

3. *The Gibson version*, dictated in 1899 by Chief John Arthur Gibson of the Six Nations Reserve to the late J.N.B. Hewitt of the Smithsonian Institution, and revised by Chiefs Abraham Charles, John Buck, Sr., and Joshua Buck, from 1900 to 1914. This version, which was translated into English in 1941 by Dr. William N. Fenton of the Bureau of American Ethnology, Smithsonian Institution, with help of Chief Simeon Gibson.

4. *The Wallace version*, a compilation of the first three and presented as a narrative by Dr. Paul Wallace, The White Roots of Peace (Philadelphia, 1946).

5. *The Buck version*, by Roy Buck, Cayuga, narrated in Mohawk and translated to English by the North American Indian Travelling College Staff, "The Great Law," Traditional Teachings (North American Indian Traveling College, Cornwall Island, Ont., 1984)

6. *Mohawk version*, a contemporary interpretation by John C. Mohawk, Doctoral Candidate at State University of New York at Buffalo and editor for seven years of Akwesasne Notes.

[16]. Oren Lyons, "Elders Circle Communique," (1986).

[17]. Cannasatego to Colonial Officials, Treaty of Lancaster, Pennsylvania Colonial Archives.

[18]. Benjamin Franklin, the author found this quotation in Wallace, White Roots, p. 3.

[19]. George Morgan, Private Journal (April - November, 1776), 73 pp., doc. 8, Morgan Papers, preserved in a bank vault in Santa Barbara, Ca., by the Colonel George Morgan Document Company.

[20]. John Hancock to George Morgan (Philadelphia, Pa., April 19, 1776), doc. 2, Morgan Papers, 3 pp.

[21]. For an account of the origin of wampum see, Michael Kanentakeron Mitchell, Mohawk, "The Birth of the Peacemaker," Traditional Teachings (North American Indian Traveling College, Cornwall Island, Ont., 1984), v. II, p. 22-28

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[22]. Louis Thompson, "Historian Gregory Schaaf Strikes a Mother Lode of History Among a Neighbor's Keepsakes," People Magazine (January 24, 1977), pp. 20-22.

[23]. U.S. officials promised Indian leaders at the 1776 Peace Treaty, that Indians would never be forced to fight in U.S. wars. This promise recently has been recalled over the issue of young Indian men being denied college scholarships for refusing to register for the draft.

[24]. General George Washington's lobbying efforts to sway a secret committee of Congress to allow him to recruit Indian soldiers are documented in .

[25] The traditions of the Lenni Lenape are the subject of an upcoming trilogy by ~~Gregory~~ Schaaf, The Grandfathers.
The author

GREAT LAW OF PEACE
KAIANEREKOWA
of the Haudenausaunee, Iroquois Confederacy
(Founded by the Great Peacemaker, Time Immemorial)

Opening Oration
(Wampums 1,2,3)

I am [the Peacemaker]...with the statesmen of the League of Five Nations, plant the Tree of Peace...Roots have spread out...their nature is Peace and Strength. We Place at the top of the Tree of Peace an eagle... If he sees in the distance any danger threatening, he will at once warn the people of the League. If any man or any nation outside the Five Nations shall obey the laws of the Great Peace...they may trace back the roots to the Tree...[and] be welcomed to take shelter. The smoke of the Council Fire of the league shall ever ascend and pierce the sky so that other nations who may be allies may see the Council Fire of the Great Peace [the eternal flame of liberty at the center of the United Nations].

* * *

Wampum 9. Grand Council 10-X, TLL

Powers are Vested in the Elder Brothers and Younger Brothers

1. All the business of the Five Nations Confederate Council shall be conducted by the combined bodies

U.S. CONSTITUTION
Constitution of the United States
(In Convention, September 17, 1787)

Preamble

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

> I am [the Peacemaker] ...with the statesmen of the League of Five Nations, plant the Tree of Peace. . .
>
> We the people of the United States, in order to form a more perfect union.

* * *

Article 1. Legislative Department
Section 1. Congress

Powers are Vested in Senate and House

1. All legislative powers herein granted shall be vested in a

GREAT LAW OF PEACE

of the Confederate [Chief Statesmen]. First the question shall be passed upon by the Mohawk and Seneca [Chief Statesmen - the Elder Brothers], then it shall be discussed and passed by the Oneida and Cayuga [Chief Statesmen, who later added the Tuscarora, thus the Confederacy became the Six Nations].

Wampum 17. Grand Council

Selection of Chief Statesmen

1. The right of bestowing the title [of Chief Statesman] shall be hereditary in the family...the females of the family have the proprietary right to the [Chief Statesmanship] title for all time to come...(thus the women nominate the chiefs who hold office as long as the women judge him to be fulfilling his responsibilities.

Qualifications of Chief Statesmen

Wampum 27. All [Chief Statesmen] of the Five [Six] Nations Confederacy must be honest in all things...men possessing those honorable qualities that make true royaneh [chief statesmen, literally "noble leaders who walk in greatness"] . [There are no age limits, but statesmen with a family and are citizens of one of the Five, now Six Nations,with exception to the Pine Tree Chief. The clan mothers and women evaluate who is qualified to be a chief statesman.]

Wampum 53. When the Royaneh women, holders of a [chief statesman] title, select one of

U.S. CONSTITUTION

Congress of the United States, which shall consist of a Senate and House of Representatives.

> The right of bestowing the title [of Chief Statesman] shall be hereditary in the ...the females of the family

Section 2. House of Representatives

Election of Representatives

1. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the Legislature.

Qualifications of Representatives

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state which he shall be chosen.

> All [Chief Statesmen] of the Five [Six] Nations Confederacy must be honest in all things...
>
> No person shall be a Representative who shall not have attained to the age of 25 years,

GREAT LAW OF PEACE

their sons as a candidate, they shall select one who is trustworthy, of good character, of honest disposition, one who manages his own affairs, supports his own family, if any, and who has proven a faithful man to his Nation.

Apportionment of Chief Statesmen

[The number of Chief Statesmen was set by the Peacemaker, not apportioned by population. No direct taxes existed. Slavery was illegal. The idea of some people being considered less than whole was foreign and never accepted. Note "Indians not taxed" were considered separate, a status still widely asserted and defended.]

"According to the great immutable law the Iroquois confederate council was to consist of fifty rodiyaner (civil chiefs) [or Chief Statesmen, literally "goodness, like the Creator"] "(Parker, p. 10):

Elder Brothers:	
Onondaga [People of the Hill] -	14
Mohawk/Ka-nin-ke-a-ka [People of the Flint] -	9
Seneca [People of the Great Mountain] -	8
Younger Brothers:	
Oneida [People of the Standing Stone] -	9
Cayuga [People of the Pipe] -	10
Tuscarora [People of the Shirt] joined ca. 1710	
Number of Chief Statesmen:	50

[Tuscarora, Delaware, Saponi, Tutelo and Nanticoke speak through the Younger Brothers]

U.S. CONSTITUTION

> ...they shall select one who is trustworthy...good character..honest disposition..a faithful man to his Nation.

Apportionment of Representatives

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to their whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subesequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed on for every thirty thousand, but each State shall have at least one Representative; and until such enumberation shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Caroline five and Georgia three. (This clause has been superseded, so far as it relates to representation by Section 2 of the

GREAT LAW OF PEACE

When the [Chief Statesman] is deposed [or vacates position] the women shall notify the [Grand Council] through their [runner of their clan], and the [Grand Council] shall sanction the act. The women will then select another of their sons as a candidate and the [Chief Statesmen] shall elect him.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

* * *

Vacancies

Wampum 19. When the [Chief Statesman] is deposed [or vacates position] the women shall notify the [Grand Council] through their [runner of their clan], and the [Grand Council] shall sanction the act. The women will then select another of their sons as a candidate and the [Chief Statesmen] shall elect him.

* * *

Chiefs of the Grand Council - Speaker of the Grand Council

Wampum 14. When the Council of the Five [Six] Nations [Chief Statesmen] convene, they shall appoint a speaker for the day. He

U.S. CONSTITUTION

Fourteenth Amendment to the Constitution.) Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * *

Vacancies

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

* * *

Officers of the House -- Speaker of the House

5. The House of Representatives shall choose their Speaker and other officers;

GREAT LAW OF PEACE

shall be a [Chief Statesman] of either the Mohawk, Onondaga or Seneca Nation. The next day the Council shall appoint another speaker, but the first speaker may be reappointed if there is no objection, but a speaker's term shall not be regarded more than for the day.

* * *

Chiefs of the Grand Council - Impeachment

Wampum 19. If at any time it shall be manifest that a [Chief Statesman] has not in mind the welfare of the people or disobeys the rules of this Great Law, the men or the women of the Confederacy, or both jointly, shall come to the Council and unbraid [unseat] the erring [Chief Statesman] through [a man who has no pity].

* * *

Wampum 5. The Elder Brothers

Number of Chief Statemen

The Council of the Mohawk shall be divided into three parties [each has 3 chiefs totalling 9 chiefs]

[The Council of the Seneca shall be divided into 4 parties [each has 2 chiefs totalling 8 chiefs].

[Together, the Mohawk and Seneca parallel the Senate. The chiefs are chosen by the women and hold the position as long as they serve faithfully. Each has an equal voice, but decisions are formed by consensus.]

U.S. CONSTITUTION

> **If at any time it shall be manifest that a [Chief Statesman] has not in mind the welfare of the people or disobeys the rules of this Great Law...**

* * *

Officers of the House -- Impeachment

and shall have the sole power of impeachment.

> **...the men or the women of the Confederacy... shall come to the Council and unbraid the erring [Chief Statesman] through [a man who has no pity].**

* * *

Section 3. The Senate

Number of Senators

1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

(Superseded by Amendment XVII) Proposed May 13, 1912; ratified April. 8, 1913; certified May 31, 1913

> The chiefs are chosen by the women...hold the position as long as they serve faithfully. Each has an equal voice, but decisions are formed by consensus.

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Clans and Consanguinity

Wampum 42. Among the Five Nations and their posterity there shall be the following original clans: Great Name Bearer, Ancient Name Bearer, Great Bear, Turtle, Painted Turtle, Standing Rock, Large Plover, Little Plover, Deer, Pigeon Hawk, Eel, Ball, Opposite-Side-of-the-Hand.

These clans distributed through their respecitve Nations, shall be the sole owners and holders of the soil of the country and in them is it vested as a birthright. (94-XI, EUC).

Wampum 44. The lineal descent of the people of the Five [Six] Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of the mother. (60-LX, TLL).

Wampum 45. The women heirs of the Confederate [Chief Statesman] titles shall be called Royaneh (Noble) for all time to come. (61-LXI, TLL).

Wampum 46. The women of the Forty Eight (now fifty) Royaneh families shall be the heirs of the Authorized Names for all time to come.

Wampum 35. Election of Pine Tree chiefs - Should any man of the Nation assist with special ability or show great interest in the affairs of the Nation, if he proves himself wise, honest and worthy of confidence, the Confederate [Chief Statesmen] may elect him to a seat with them and he may sit in the Confederate Council. He shall be proclaimed a Pine Tree sprung up for the Nation and

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Classification of Senators

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second; and if vacancies happen by resignation, or otherwise during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

(modified by Ammendment XVII)

The lineal descent of the people of the Five [Six] Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of the mother.

GREAT LAW OF PEACE

be installed as such at the next assembly for the installation of the [Chief Statesmen]. (LXVIII-68,TLL).

Qualifications of Chief Statesmen

Wampum 24. The [Chief Statesmen] of the Confederacy of the Five [Six] Nations shall be mentors of the people for all time. The thickness of their skin shall be seven spans -- which is to say that they shall be proof against anger, offensive actions and criticism. Their hearts shall be full of peace and good will and their minds filled with a yearning for the welfare of the people of the Confederacy. With endless patience they shall carry out their duty and their firmness shall be tempered with a tenderness for their people. Neither anger nor fury shall find lodgement in their minds and all their words and actions shall be marked by calm deliberation. (33-XXXIII, TLL).

Wampum 27. All [Chief Statesmen] of the Five Nations must be honest in all things. They must not idle or gossip, but be men possessing those honorable qualities that make true royanch. It shall be a serious wrong for anyone to lead a [Chief Statesman] into trivial affairs, for the people must ever hold their Lords high in estimation out of respect to their honorable positions. (45-XLV, TLL)

Speaker of the Grand Council

Wampum 14. When the Council of the Five [Six] Nations [Chief

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Qualification of Senators

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The [Chief Statesmen] of the Confederacy of the Five [Six] Nations shall be mentors of the people for all time. The thickness of their skin shall be seven spans -- which is to say that they shall be proof against anger, offensive actions and criticism. Their hearts shall be full of peace and good will...

President of Senate

4. The Vice President of the United States shall be President of the Senate, but shall have no vote,

GREAT LAW OF PEACE

Statesmen] shall convene they shall appoint a speaker for the day. He shall be a [Chief Statesman] of either the Mohawk, Onondaga or Seneca Nation.

Chief Statesmen of the Elder Brothers
Wampum 3. To you Adodarhoh, the Onondaga cousin [Chief Statesmen], I have entrusted the caretaking and the watching of the Five Nations Council Fire.

Trial of Impeachment
Wampum 19. If at any time it shall be manifest that a [Chief Statesman] has not in mind the welfare of the people or disobeys the rules of this Great Law, the men or the women of the Confederacy, or both jointly, shall come to the Council and upbraid the erring [Chief Statesman] through his War Chief. If the complaint of the people through the War Chief is not heeded the first time it shall be uttered again and then if no attention is given a third complaint and warning shall be given. If the [Chief Statesman] is still contumacious the matter shall go to the council of War Chiefs. (66 -- LXVI, TLL).

Judgment on the Conviction of Impeachment
Wampum 19 (cont.). The War Chiefs shall then divest the erring [Chief Statesman] of his title by order of the women in whom the titleship is vested. When the [Chief Statesman] is deposed the women shall notify the Confederate [Chief Statesmen] through their War Chief, and the [Chief

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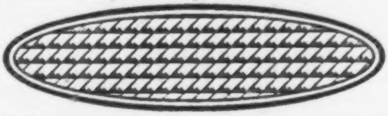
unless they be equally divided.



Officers of Senate
5. The Senate shall choose their other officers, and also a President pro Tempore, in the absence of the Vice President or when he shall exercise the office of President of the United States.

Trial of Impeachmemt
6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried the Chief Justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

> **The War Chiefs shall then divest the erring [Chief Statesman] of his title by order of the women...**

Judgment on Conviction of Impeachment
7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

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Statesmen] shall sanction the act. The women will then select another of their sons as a candidate and the [Chief Statesmen] shall elect him. Then shall the chosen one be installed by the Installation Ceremony. (123-XLI, EUC), Cf. 42-XLII).

When a [Chief Statesman] is to be deposed, his War Chief shall address him as follows:

"So you, _______, disregard and set at naught the warnings of your women relatives. So you fling the warning over your shoulder to cast them behind you.

"Behold the brightness of the Sun and in the brightness of the Sun's light I depose you of your title and remove the sacred emblem of the [Chief Statesmanship] title. I remove from you brow the deer's antlers to the women whose heritage they are."

The War Chief shall now address the women of the deposed Lord and say:

"Mothers, as I have now deposed your [Chief Statesman], I now return to you the emblem and the title of [Chief Statesmanship], therefore repossess them."

Again addressing himself to the deposed [Chief Statesman] he shall say:

"As I have now deposed and discharged you so you are now no longer [Chief Statesman]. You shall now go your way alone, the rest of the people of the Confederacy will not go with you, for we know not the kind of mind that possesses you. As the Creator has nothing to do with wrong so he will not come to rescue you from the precipice of destruction in

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When the [Chief Statesman] is deposed the women shall notify the Confederate [Chief Statesmen] through their War Chief, and the [Chief Statesmen] shall sanction the act. The women will then select another of their sons as a candidate and the [Chief Statesmen] shall elect him. Then shall the chosen one be installed by the Installation Ceremony.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

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which you have cast yourself. You shall never be restored to the position which you once occupied."

Then shall the War Chief address himself to the [Chief Statesmen] of the Nation to which the deposed [Chief Statesman] belongs and say: "Know you, my [Chief Statesmen], that I have taken the deer's antlers from the brow of _______, the emblem of his position and token of his greatness."

The [Chief Statesmen] of the Confederaçy shall then have no other alternative than to sanction the discharge of the offending [Chief Statesman] (42-XLII, TLL).

Election of Elder and Younger Brothers -- Meetings of the Grand Council

Election of Members of the Grand Council

Wampum 54. When a [Chief Statesmanship] title becomes vacant through death or other cause, the Royaneh women of the clan in which the title is hereditary shall hold a council and shall choose one from among their sons to fill the office made vacant. Such a candidate shall not be the father of any Confederate [Chief Statesman]. If the choice is unanimous the name is referred to the men relatives of the clan. If they should disapprove it shall be their duty to select a candidate from among their own number If then the men and women are unable to decide which of the two candidates shall be named, then the matter shall be referred to the

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Then shall the War Chief address himself to the [Chief Statesmen] of the Nation to which the deposed [Chief Statesman] belongs and say: "Know you, my [Chief Statesmen], that I have taken the deer's antlers from the brow of _______, the emblem of his position and token of his greatness."

Section 4. Election of Senators and Representatives -- Meetings of Congress

Election of Members of Congress

1. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

(See Amendment XX)

...Royaneh women of the clan in which the title is hereditary shall hold a council and shall choose one from among their sons...

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Confederate [Chief Statesmen] in the Clan. They shall decide which candidate shall be named. If the men and the women agree to a candidate his name shall be referred to the sister clans for confirmation. If the sister clans confirm the choice, they shall refer their action to their Confederate [Chief Statesmen] who shall ratify the choice and present it to their cousin [Chief Statesmen], and if the cousin [Chief Statesmen] confirm the name then the candidate shall be installed by the proper ceremony for the conferring of [Chief Statesmanship] titles. (65-LXV, TLL).

Grand Council to Meet Whenever There is a Need

Wampum 3. When there is any business to be transacted and the Confederate Council is not in session, a messenger shall be dispatched either to Adodarho, Hononwirehtonh or Skanawatih, Fire Keepers, or to their War Chiefs with a full statement of the case desired to be considered. Then shall Adodarhoh call his cousin (associate) [Chief Statesmen] together and consider whether or not the case is of sufficient importance to demand the attention of the Confederate Council. If so, Adodarhoh shall dispatch messengers to summon all the Confederate [Chief Statesmen] together to assemble beneath the Tree of the Long Leaves...(4-IV, TLL).

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> **If the men and the women agree to a candidate his name shall be referred to the sister clans for confirmation. If the sister clans confirm the choice, they shall refer their action to their Confederate [Chief Statesmen] who shall ratify the choice...**

Congress to Meet Annually

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

(Changed to January 3d by Amendment XX)

> **...Adodarhoh shall dispatch messengers to summon all the Confederate [Chief Statesmen] together to assemble beneath the Tree of the Long Leaves...**
>
> ---
>
> **The Congress shall assemble at least once in every year...**

GREAT LAW OF PEACE

Powers and Duties of Each Nation of the Grand Council

Sole Judge of Qualifications of Members

Wampum 17. A bunch of a certain number of shell (wampum) strings each two spans in length shall be given to each of the female families in which the [Chief Statesmanship] titles are vested. The right of bestowing the title shall be hereditary in the family of females legally possessing the bunch of shell strings and the strings shall be the token that the females of the family have the proprietary right to the [Chief Statesmanship] title for all time to come, subject to certain restrictions hereinafter mentioned. (59-LIX, TLL).

Wampum 18. If any Confederate [Chief Statesman] neglects or refuses to attend the Confederate Council, the other [Chief Statesmen] of the Nation of which he is a member shall require their War Chief to request the female sponsors of the [Chief Statesman] so guilty of defection to demand his attendance of the Council. If he refuses, the women holding the title shall immediately select another candidate for the title.

No [Chief Statesman] shall be asked more than once to attend the Confederate Council. (30-XXX, TLL).

Rules of Proceedings -- Punishment of Chief Statesmen

Wampum 52. The Royaneh women, heirs of the [Chief Statesmanship] titles, shall should

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Section 5. Powers and Duties of Each House of Congress

Sole Judge of Qualifications of Members

1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

> **The right of bestowing the title shall be hereditary in the family of females legally possessing the bunch of shell strings and the strings shall be the token that the females of the family have the proprietary right to the [Chief Statesmanship] title for all time to come...**

Rules of Proceedings -- Punishment of Members

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence

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it become necessary, correct and admonish the holders of their titles. Those only who attend the Council may do this and those who do not shall not object to what has been said nor strive to undo the action (63-LXIII, TLL).

Wampum Records

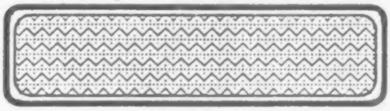
Wampum 23. Any [Chief Statesman] of the Five [Six] Nations Confederacy may construct shell strings (or wampum belts) of any size or length as pledges or records of matters of national or international importance.

When it is necessary to dispatch a shell string by a War Chief or other messenger as the token of a summons, the messenger shall recite the contents of the string to the party to whom it is sent. That party shall repeat the message and return the shell string and if there has been a summons he shall make ready for the journey.

Any of the people of the Five [Six] Nations may use shells (or wampum) as the record of a pledge, contract or an agreement entered into and the same shall be binding as soon as shell strings shall have been exchanged by both parties. (32-XXXII, TLL).

Adjournment

Wampum 8. The Firekeepers shall formally open and close all councils of the Confederate [Chief Statesmen].



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of two-thirds, expel a member.

The Royaneh women, heirs of the [Chief Statesmanship] titles, shall ...correct and admonish the holders of their titles.

Journals

3. Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the Journal.

Any [Chief Statesman] of the Five [Six] Nations Confederacy may construct shell strings (or wampum belts) of any size or length as pledges or records of matters of national or international importance.

Each House shall keep a Journal of its proceedings...

Adjournment

4. Neither House, during the session of Congress, shall without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

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Compensation, Privileges and Disabilities, of Chief Statesmen

Compensation -- Privileges

[Chief Statesmen do not receive monetary compensation for their services.]

[Chief Statesmen are not above the law in any case.]

Wampum 98. If either a nephew or a niece see an irregularity in the performance of the functions of the Great Peace and its laws, in the Confederate Council or in the conferring of [Chief Statesmanship] titles in an improper way, through their War Chief they may demand that such actions become subject to correction and that the matter conform to the ways prescribed by the laws of the Great Peace. (LXVII-67, TLL).

Disability to Hold Other Offices

[Although Chief Statesmen may not be appointed to any official office outside of his national duties, they do also serve as a spiritual leaders]

Wampum 26. It shall be the duty of all the Five [Six] Nations Confederate [Chief Statesmen], from time to time as occasion demands, to act as mentors and spiritual guides of their people and remind them of their Creator's will and words. They shall say:

"Hearken, that peace may continue unto future days!

"Always listen to the words of the Great Creator, for he has spoken.

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Section 6. Compensation, Privileges and Disabilities, of Senators and Representatives

Compensation -- Privileges

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be question in any other place.

Disability to Hold Other Offices

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either House during his continuance in office.

(See also Section 3 of the Fourteenth Amendment)

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"United People, let not evil find lodging in your minds.

"For the Great Creator has spoken and the cause of Peace shall not become old.

"The cause of peace shall not die if you remember the Great Creator."

Every Confederate [Chief Statesman] shall speak words such as these to promote peace. (37-XXXVII, TLL).

Mode of Passing Laws

No Special Provision as the Revenue Laws

Decisions, How Enacted

Wampum 9. All the business of the Five [Six] Nations Confederate Council shall be conducted by the two combined bodies of Confederate [Chief Statesmen]. First the question shall be passed upon by the Mohawk and Seneca [Elder Brothers] [Chief Statesmen], then it shall be discussed and passed by the Oneida and Cayuga [Younger Brothers] [Chief Statesmen]. Their decisions shall then be referred to the Onondaga [Chief Statesmen], (Fire Keepers) for final judgment. (10-XI, TLL).

Wampum 10. In all cases the procedure must be as follows: when the Mohawk and Seneca [Chief Statesmen] have unanimously agreed upon a question, they shall report their

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> **"For the Great Creator has spoken and the cause of Peace shall not become old.**
>
> **"The cause of peace shall not die if you remember the Great Creator."**

Section 7. Mode of Passing Laws

Special Provision as to Revenue Laws

1. All bills for raising revenue shall originate in the House of Representative; but the Senate may propose or concur with amendments as on other bills.

Laws, How Enacted

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of bother Houses shall be determined by yeas and nays,

GREAT LAW OF PEACE

decision to the Cayuga and Oneida [Chief Statesmen] who shall deliberate upon the question and report a unanimous decision to the Mohawk [Chief Statesmen]. The Mohawk [Chief Statesmen] will then report the standing of the case to the Firekeepers [Onondaga], who shall render a decision (17-XVII, TLL) as they see fit in case of a disagreement by the two bodies, or confirm the decisions of the two bodies if they are identical. The Fire Keepers shall then report their decision to the Mohawk [Chief Statesmen] who shall announce it to the open council. (12-XII, TLL).

Decisions, Etc.

Wampum 12. When a case comes before the Onondaga [Chief Statesmen] (Fire Keepers) for discussion and decision, Adodarho shall introduce the matter to his [fellow Chief Statesmen] who shall then discuss it in their two bodies. Every Onondaga [Chief Statesman] except Hononwiretonh shall deliberate and he shall listen only. When a unanimous decision shall have been reached by the two bodies of Fire Keepers, Adodarho shall notify Hononwiretonh of the fact when he shall confirm it. He shall refuse to confirm a decision if it is not unanimously agreed upon by both sides of the Fire Keepers. (19-XIX, TLL).

Wampum 11. If through any misunderstanding or obstinacy on the part of the Fire Keepers, they render a decision at variance with that of the Two Sides, the Two Sides shall reconsider the matter and if their decisions are jointly the

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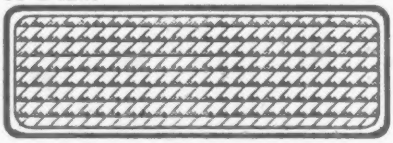
and the names of the persons voting for and against the bill shall be entered on the Journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.



Resolutions, Etc.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

When a unanimous decision shall have been reached by the two bodies of Fire Keepers, Adodarho shall notify Hononwiretonh of the fact when he shall confirm it...

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same as before they shall report to the Fire Keepers who are then compelled to confirm their joint decision. (18-XVIII, TLL).

Powers Granted to the Grand Council

No Taxation
[There is no taxation under the Great Law. There also was no money. Today, when there is a need to provide for the general welfare, the people who wish to help come together to work for the common good.]

No Loans
[There is no national debt, because there is no provision for loans.]

Commerce
[The people are free to trade as they wish, as long as they do not endanger the health and welfare of the people.]

Naturalization and No Bankruptcies
Wampum 2. Roots have spread out from the Tree of the Great Peace, one to the north, one to the east, one to the south and one to the west. The name of these roots is The Great White Roots and their nature is Peace and Strength.

If any man [or woman] or any nation outside the Five Nations shall obey the laws of the Great Peace and make known their disposition to the [Chief Statesmen] of the Confederacy, they may trace the Roots of the Tree and if their minds are clean

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Section 8. Powers Granted to Congress

Taxation
1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

Loans
2. To borrow money on the credit of the United States;

Commerce
3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

Naturalization and Bankruptcies
4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

> **Roots have spread out from the Tree of the Great Peace...The name of these roots is The Great White Roots and their nature is Peace and Strength...**

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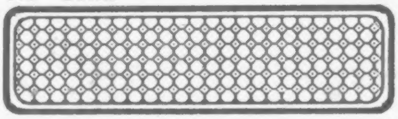
and they are obedient and promise to obey the wishes of the Confederate Council, they shall be welcomed to take shelter beneath the Tree of the Long Leaves.

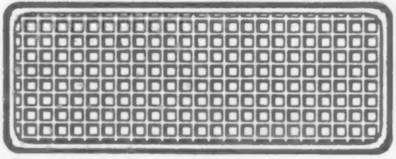
No Coins



No Counterfeiting
[However, Europeans made and distibuted counterfeit wampum which disrupted the economy.]

Runners as Messengers
Wampum 40. When the [Chief Statesmen] of the Confederacy take occasion to dispatch a messenger in behalf of the Confederate Council, they shall wrap up any matter they may send and instruct the messenger to remember his errand, to turn not aside but to proceed faithfully to his destination and deliver his message according to every instruction. (57-XLVII, TLL).

No Patents and Copyrights



Council Fires
Wampum 96. All the Clan council fires of a nation or of the Five [Six] Nations may unite into one general council fire, or delegates from all the council fires may be appointed to unite in a general

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> ...they shall be welcomed to take shelter beneath the Tree of the Long Leaves.

Coin
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

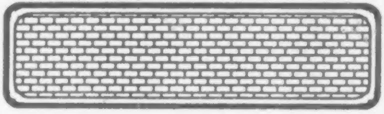
Counterfeiting
6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

Post Office
7. To establish post offices and post roads;

> ...instruct the messenger to remember his errand...to proceed faithfully to his destination and deliver his message according to every instruction.

Patents and Copyrights
8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

Courts
9. To constitute tribunals inferior to the Supreme Court;



GREAT LAW OF PEACE

council for discussing the interests of the people.

Piracies
[The Great Law applies equally on land and sea.]

War
Wampum 80. When the Confederate Council of the [Six] Five Nations has for its object the establishment of the Great Peace among the people of an outside nation and that nation refuses to accept the Great Peace, then by such refusal they bring a declaration of war upon themselves from the Five Nations. Then shall the Five [Six] Nations seek to establish the Great Peace by a conquest of the rebellious nation. (II-71, SPW).

No Standing Army or Navy
Wampum 81. When the men of the Five [Six] Nations, now called forth to become warriors, are ready for battle with an obstinate opposing nation that has refused to accept the Great Peace, then one of the five War Chiefs shall be chosen by the warriors of the Five [Six] Nations to lead the army into battle.

Rights and Powers of War
Wampum 81 (cont.). It shall be the duty of the War Chief so chosen to come before his warriors and address them. His aim shall be to impress upon them the necessity of good behavior and strict obedience to all the commands of the War Chiefs. He shall deliver

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Piracies
10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

War
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

> **When the Confederate Council of the [Six] Five Nations has for its object the establishment of the Great Peace among the people of an outside nation...**

Army
12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

Navy
13. To provide and maintain a navy;

Military and Naval Rules
14. To make rules for the government and regulation of the land and naval forces.

> **His aim shall be to impress upon them the necessity of good behavior...**

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an oration exhorting them with great zeal to be brave and courageous and never to be guilty of cowardice. At the conclusion of his oration he shall march forward and commence the War Song and he shall sing:

Now I am greatly surprised
And, therefore, I shall use it, --
The power of my War Song.
I am of the Five Nations
And I shall make supplication
To the Almighty Creator.
He has furnished this army.
My warriors shall be mighty
In the strength of the Creator
Between him and my song they are
For it was he who gave the song
This war song that I sing!
(III-72, SPW).

The Black Wampum Belt
Wampum 91. A certain wampum belt of black beads shall be the emblem of the authority of the Five [Six] War Chiefs to take up the weapons of war and with their men to resist invasion. This shall be called a war in defense of the territory. (XIV-83, SPW).

War Chiefs, Names, Duties and Rights
Wampum 37. There shall be one War Chief for each Nation and their duties shall be to carry messages for their [Chief Statesmen] and to take up the arms of war in case of emergency. They shall not participate in the proceedings of the Confederate Council but shall watch its progress and in case of an erroneous action by a [Chief Statesman] they shall receive the complaints of the people and

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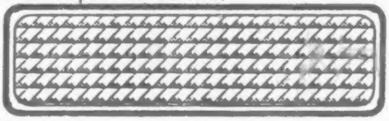
He shall deliver an oration exhorting them with great zeal to be brave and courageous and never to be guilty of cowardice...and he shall sing:

Now I am greatly surprised
And, therefore, I shall use it, --
The power of my War Song.
I am of the Five Nations
And I shall make supplication
To the Almighty Creator.

Militia, Calling Forth
15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;



Militia, Organizing and Arming
16. . To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipIne prescribed by Congress;

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convey the warnings of the women to him. The people who wish to convey messages to the Lords in the Confederate Council shall do so through the War Chief of their Nation. It shall ever be his duty to lay the cases, questions and propositions of the people before the Confederate Council. (54-LIV, TLL).

Council Fire of the Confederacy, Center of the Six Nations

Wampum 1. I plant [the Tree of the Great Peace] in your territory, Adodarho, and the Onondaga Nation, in the territory of you who are Firekeepers.

I name the tree the Tree of the Great Long Leaves. Under the shade of this Tree of Great Peace we spread the soft white feathery down of the glove thistle as seats for you, Adodarho, and your cousin [Chief Statesmen].

We placé you upon those seats, spread soft with the feathery down of the globe thistle, there beneath the shade of the spreading branches of the Tree of Peace.

There shall you sit and watch the Council Fire of the Confederacy of the Five [Six] Nations, and all the affairs of the Five [Six] Nations shall be transacted before you, Adodarhoh, and your cousin [Chief Statesmen], by the Confederate [Chief Statesmen] of the Five [Six] Nations. [1-I, TLL]

Adding to the Rafters

Wampum 16. If the conditions which shall arise at any future time call for an addition to or change of this law, the case shall

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> **...in case of an erroneous action by a [Chief Statesman] they shall receive the complaints of the people and convey the warnings of the women to him.**

Federal District and Other Places

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful building; -- And

> **I plant [the Tree of the Great Peace] in your territory, Adodarho, and the Onondaga Nation, in the territory of you who are Firekeepers...**
>
> **There shall you sit and watch the Council Fire of the Confederacy of the Five [Six] Nations...**

Make Laws to Carry Out Foregoing Powers

18. To make all laws which shall be necessary and proper for carrying into execution the fore

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be carefully considered and if a new beam seems necessary or beneficial, the proposed change shall be voted upon and if adopted it shall be called, "Added to the Rafters." (48-XLVII, TLL).

Limitations on Powers Granted to the Confederacy

No Slave Trade

No Jails or Prisons
[Since there were no jails or prisons, laws related to detainment were not necessary.]

No Jails or Prisons
[Since there were no jails or prisons, laws related to detainment were not necessary.]

No Reference to Laws which have an effect after the fact.

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going powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof.

(For other powers, see Article II, Section 1; Article III, Sections 2 and 3; Article IV, Sections 1-3; Article V; and Amendments XII-XVI and XIX-XXI.

Section 9. Limitations on Powers Granted to the United States

Slave Trade
1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

Habeas Corpus
(a law requiring that a detained person be brought before a court at a stated time and place to determine the legality of his detainment)
2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Ex Post Facto Law
(a law which has a retroactive effect after the fact)
3. No bill of attainder or ex post facto law shall be passed.

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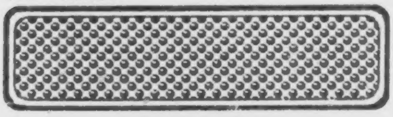
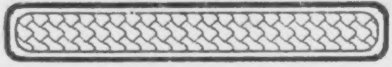
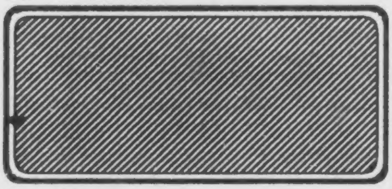
No Taxes



No Duties on Exports



No Commercial Discrimination to Be Made Between the Six Nations



No Money

The women heirs of the Confederate [Chief Statesmanship] titles shall be called Royaneh (Noble) for all time to come.

Titles of Nobility

Wampum 45. The women heirs of the Confederate [Chief Statesmanship] titles shall be called Royaneh (Noble) for all time to come. (61-LXI, TLL).

Wampum 46. The women of the Forty Eight (now fifty) Royaneh families shall be the heirs of the Authorized Names for all time to come. (95-XII, EUC).

Wampum 47. If the female heirs of the Confederate [Chief Statesmen's] titles become extinct, the title right shall be given by the

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Direct Taxes

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

Duties on Exports

5. No tax or duty shall be laid on articles exported from any State.

No Commercial Discrimination to Be Made Between States

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

Money, How Drawn From Treasury

7. No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

Titles of Nobility

8. No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept any present, emolument, office, or title, of any kind whatever, from any King, Prince, or foreign State.

(For other limitations see Amendments I-X.)

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[Chief Statesmen] of the Confederacy to the sister family whom they shall elect and that family shall hold the name and transmit it to their (female) heirs, but they shall not appoint any of their sons as a candidate for the title until all the eligible men of the former family shall have died or otherwise have become ineligible (25-XXV, TLL). **Wampum 48.** If all the heirs of the [Chief Statesman] title become extinct, and all the families in the clan, then the title shall be given by the [Chief Statesmen] of the Confederacy to the family in a sister clan whom they shall elect. (26-XXVI, TLL). **Wampum 49.** If any of the Royaneh women, heirs of the titleship, shall wilfully withhold a [Chief Statesmanship] or other title and refuse to bestow it, or if such heirs abandon, forsake or despise their heritage, then shall such women be deemed buried and their family extinct. The titleship shall then revert to a sister family or clan upon application and complaint. The [Chief Statesmen] of the Confederacy shall elect the family or clan which shall in future hold the title. (28-XXVIII, TLL).	**If the female heirs of the Confederate [Chief Statesmen's] titles become extinct, the title right shall be given by the [Chief Statesmen] of the Confederacy to the sister family whom they shall elect and that family shall hold the name and transmit it to their (female) heirs...** **If any of the Royaneh women, heirs of the titleship, shall wilfully withhold a [Chief Statesmanship] or other title and refuse to bestow it, or if such heirs abandon, forsake or despise their heritage, then shall such women be deemed buried and their family extinct.**
Powers Prohibited to the Nations	**Section 10. Powers Prohibited to the States**
Powers Prohibited, Absolutely	**Powers Prohibited, Absolutely**
Wampum 92. If a nation, part of a nation, or more than one nation within the Five [Six] Nations should in any way endeavor to destroy the Great Peace by neglect	**1.** No State shall enter into any treaty, alliance, or confederation; grant letter of marque and reprisal; coin money; emit bills of credit; make anything but gold

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or violating its laws and resolve to dissolve the Confederacy, such a nation or such nations shall be deemed guilty of treason and called enemies of the Confederacy and the Great Peace. (III-86, EUC).

No Reference

> **Before the real people united their nations, each nation had its council fires. Before the Great Peace their councils were held. The five Council Fires shall continue to burn as before and they are not quenched.**

Powers Permitted With Consent of Grand Council

Wampum 97. Before the real people united their nations, each nation had its council fires. Before the Great Peace their councils were held. The five Council Fires shall continue to burn as before and they are not quenched. The [Chief Statesmen] of each nation in future shall settle their nation's affairs at this council fire governed always by the laws and rules of the council of the Confederacy and by the Great Peace. (VII-90, EUC).

> **The [Chief Statesmen] of each nation in future shall settle their nation's affairs at this council fire governed...by the Great Peace.**

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and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Powers Concerning Duties on Imports or Exports

2. No State shall, without the consent of the Congress, lay any imports or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

Powers Permitted With Consent of Congress

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

> No State shall, without the consent of Congress...enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded...

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THE FIREKEEPERS ONONDAGA

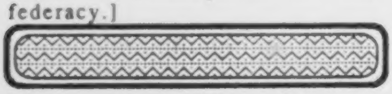
The Adodarho

Executive Power Entrusted with the Adodarho -- Term of Office

Wampum 3. To you Adodarhoh, the Onondaga cousin [Chief Statesmen], I and the other Confederate [Chief Statesmen] have entrusted the caretaking and the watching of the Five [Six] Nations Council Fire. [The term of office is for life, unless he breaks the Great Law and is impeached or has grounds for retirement.] (4-IV, TLL).

Designation and Number of Adodarho Electors

[The present Adodarho told the author that he is a member of the Eel Clan. The Clan Mother, the grandmothers and the mothers of that clan meet to elect a man endowed with the qualities and character required for the position of Adodarho, the Firekeeper of the Confederacy.]



Mode of Electing Adodarho and other Chief Statesmen

Wampum 32. If a [Adodarho or other Chief Statesman] should die while the Council of the Five [Six] Nations is in session the Council shall adjourn for ten days. No Confederate Council shall sit within ten days of the death of a [Adodarho or other Chief Statesman] of the Confederacy.

If the Three Brothers (the

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ARTICLE II. EXECUTIVE DEPARTMENT

Section 1. The President

Executive Power Vested in the President -- Term of Office

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

The executive power shall be vested in a President of the United States. . .

Appointment and Number of Presidential Electors

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the who number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Mode of Electing President and Vice President

3. The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to

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Mohawk, the Onondaga and the Seneca) should lose one of their Lords by death, the Younger Brothers (the Oneida, the Cayuga and Tuscarora) shall come to the surviving [Chief Statesmen] of the Three Brothers on the tenth day and console them. . .And the consolation shall be the reading of the contents of the thirteen shell (wampum) strings of Ayonhwhathah [Hiawatha or "He Who Combs"]. At the termination of this rite a successor shall be appointed, to be appointed by the women heirs of the [Chief Statesmanship] title. If the women are not yet ready to place their nominee before the [Chief Statesmen], the Speaker shall say, "Come let us go out." All shall then leave the Council or the place of gathering. The installation shall then wait until such a time as the women are ready. The Speaker shall lead the way from the house by saying, "Let us depart to the edge of the woods and lie in waiting on our bellies." (22-XXII, TLL).

If the Three Brothers (the Mohawk, the Onondaga and the Seneca) should lose one of their Lords by death, the Younger Brothers (the Oneida, the Cayuga and Tuscarora) shall come to the surviving [Chief Statesmen] of the Three Brothers on the tenth day and console them. .

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the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the vote shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

(This paragraph has been superseded by the Twelfth Amendment to the Constitution. See also Amendment XX.)

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Time of Installing a Adodarho or Other Chief Statesman
Wampum 30. The [Chief Statesmen] of the Confederacy may confer the [Chief Statesmanship] title upon a candidate whenever the Great Law is recited, if there be a candidate, for the Great Law speaks all the rules. (XLIV-44, TLL).

Wampum 32. (cont.) When the women title holders shall have chosen one of their sons, the Confederate [Chief Statesmen] will assemble in two places, the Younger Brothers [similar to the House of Representatives] in one place and the Three Older Brothers [similar to the Senate] in another. The [Chief Statesmen] who are to console the mourning [Chief Statesmen] shall choose one of their number to sing the Pacification Hymn as they journey to the sorrowing [Chief Statesmen]. The singer shall lead the way and the [Chief Statesmen] and the people shall follow. When they reach the sorrowing [Chief Statesmen,] they shall hail the candidate [Adodarho or other Chief Statesman]and perform the rite of Conferring the [Adodarho or other Chief Statesmanship] Title. (22-XXII, TLL).

Qualifications of Adodarho
Wampum 53. When the Royaneh women, holders of the [Adodarho] title, select one of their sons as a candidate, they shall select one who is trustworthy, of good character, or honest disposition, one who manages his own affairs, supports his own family, if any, and who has proven a faithful man to his Nation.

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Time of Choosing Electors and Casting Electoral Vote
4. The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

When the Royaneh women, holders of the [Adodarho] title, select one of their sons as a candidate, they shall select one who is trustworthy, of good character, or honest disposition, one who manages his own affairs, supports his own family, if any, and who has proven a faithful man to his Nation.

Qualifications of President
5. No person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the

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(64-LXIV, TLL).

Adodarho Succession

Wampum 33. When a Confederate [Chief Statesman, such as the Adodarho] dies, the surviving relatives shall immediately dispatch a messenger, a member of another clan, to the [Chief Statesmen] in another locality. When the runner comes within hailing distance of the locality he shall utter a sad wail, thus: "Kwa-ah, Kwa-ah, Kwa-ah!" The sound shall be repeated three times and then again and again at intervals as many times as the distance may require. When the runner arrives at the settlementthe people shall assemble and one must ask him the nature of his sad message. He shall then say, "Let us consider." Then he shall tell them of the death of the [Adodarho]. He shall deliver to them a string of shells (wampum) and say, "Here is the testimony, you have heard the message." He may then return home.

It now becomes the duty of the [Chief Statesmen] of the locality to send runners to other localities and each locality shall send other messengers until all [Chief Statesmen] are notified. Runners shall travel day and night. (23-XXIII, TLL). [No one will take Adodarho's place until a new Adodarho is selected by the women of his clan and he has been installed.]

No Salary for Adodarho

[The position of Adodarho and other Chief Statesmen are unpaid. The people of their own free will

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United States.

(See also Article II, Section 1, and Fourteenth Amendment)

Presidential Succession

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

> **When a Confederate [Chief Statesman, such as the Adodarho] dies, the surviving relatives shall...dispatch a messenger, a member of another clan, to the [Chief Statesmen] in another locality. When the runner comes within hailing distance of the locality he shall utter a sad wail...: "Kwa-ah, Kwa-ah, Kwa-ah!"**

Salary of President

7. The President shall, at stated times, receive for his services, a compensation, which shall

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support the needs of their leaders.]

> ...he will live according to the constitution of the Great Peace...

Installation of Adodarho Wampum 28. When a candidate [Chief Statesman] is to be installed he shall furnish four strings of shells (or wampum) one span in length bound together at one end. Such will constitute the evidence of his pledge to the Confederate [Chief Statesmen] that he will live according to the constitution of the Great Peace and exercise justice in all affairs.

When the pledge is furnished the Speaker of the Council must hold the shell strings in his hand and address the opposite side of the Council Fire and he shall commence his address saying: "Now behold him. He has now become a Confederate [Chief Statesman]. See how splendid he looks." An address may then follow. At the end of it he shall send the bunch of shell strings to the opposite side and they shall be received as evidence of the pledge. Then shall the opposite side say:

"We now do crown you with the sacred emblem of the deer's antlers, the emblem of the [Chief Statesmanship]. You shall now become a mentor of the people of the Five [Six] Nations. The thickness of your skin shall be seven spans -- which is to say that you shall be proof against anger, offensive actions and criticism. Your heart shall be filled with peace and good will and your mind

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neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Oath of Office of President 8. Before he enter on the execution of his office, he shall take the following oath or affirmation: -- "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

> "We now do crown you with the sacred emblem of the deer's antlers, the emblem of the [Chief Statesmanship]. You shall now become a mentor of the people of the Five [Six] Nations. The thickness of your skin shall be seven spans -- which is to say that you shall be proof against anger, offensive actions and criticism. Your heart shall be filled with peace and good will...your mind filled with a yearning for the welfare of the people...

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filled with a yearning for the welfare of the people of the Confederacy. With endless patience you shall carry out your duty and your firmness shall be tempered with tenderness for your people. Neither anger nor fury shall find lodgement in your mind and all your words and actions shall be marked with calm deliberation. In all of your deliberations in the Confederate Council, in your efforts at law making, in all your official acts, self interest shall be cast into oblivion. Cast not over your shoulder behind you the warnings of the nephews and nieces should they chide you for any error or wrong you may do, but return to the way of the Great Law which is just and right. Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground -- the unborn of the future Nation." (51-LI, TLL).

Wampum 64. At the ceremony of the installation of [Chief Statesman] if there is only one expert speaker and singer of the law and the Pacification Hymn to stand at the council fire, then when this speaker and singer has finished addressing one side of the fire he shall go to the opposite side and reply to his own speech and song. He shall thus act for both sides of the fire until the entire ceremony has been completed. Such a speaker and singer shall be termed the "Two Faced," because he speaks and sings for both sides of the fire. (XLIX-49, TLL).

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With endless patience you shall carry out your duty and your firmness shall be tempered with tenderness for your people. Neither anger nor fury shall find lodgement in your mind and all your words and actions shall be marked with calm deliberation. In all of your deliberations in the Confederate Council, in your efforts at law making, in all your official acts, self interest shall be cast into oblivion. Cast not over your shoulder behind you the warnings of the nephews and nieces should they chide you for any error or wrong you may do, but return to the way of the Great Law which is just and right. Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations

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Powers of the Adodarho, Firekeeper of the Six Nations

Not a War Chief

[Adodarho and the Chief Statesmen are responsibile for promoting peace, not war. If the territory of the Conferacy is threatened, the authority to defend the people is transferred to the War Chiefs.]

Wampum 36. The title names of the Chief Confederate [Chief Statesmen's] War Chiefs shall be:

Ayonwaehs, War Chief under Chief Takarihoken (Mohawk)
Kahonwahdironh, War Chief under Chief Odatshedeh (Oneida)
Ayendes, War Chief under Chief Adodarhoh (Onondaga)
Wenenhs, War Chief under Chief Dekaenyonh (Cayuga)
Shoneradowaneh, War Chief under Chief Skanyadariyo (Seneca)

The women heirs of each head [Chief Statesman's] title shall be the heirs of the War Chief's title of their respecitive [Chief Statesman]. (52-LII, TLL).

The War Chiefs shall be selected from the eligible sons of the female families holding the head [Chief Statesmanship] titles. (53-LIII, TLL).

Treaties and Appointments

[Adodarho alone does not have the power to make treaties. Since decisions are made by consensus, a treaty would require near unanimous agreement of the people and their leaders to become law. In contrast with the representative form democracy under the U.S. Constitution, the Six Nations practice particapatory democracy

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Section 2. Powers of the President

Commander-in-Chief

1. The President shall be commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

> **The women heirs of each head [Chief Statesman's] title shall be the heirs of the War Chief's title...The War Chiefs shall be selected from the eligible sons of...female families holding the head [Chief Statesmanship] titles.**

Treaties and Appointments

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, Judges of the Supreme Court, and

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which means the people have the right to actively participate in their government. Adodarho and other Chief Statesman also do not have the power to appoint ambassadors, consuls, judges nor other officials -- the power to select leaders rests with the Clan Mothers and the Women's Councils who also serve somewhat like the Supreme Court.]	all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.
Filling Vacancies [The Clan Mothers and the Women's Councils fill the vacancies. Since they have raised the children from birth, they are trusted to know which adults may best serve the people faithfully.]	**Filling Vacancies** 3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.
Duties of the Adodarho, Firekeeper of the Grand Council	**Section 3. Duties of the President**
Wampum 3. When the [Chief Statesmen] are assembled the Council Fire shall be kindled, but not with chestnut wood [which throws sparks, symbolizing disturbance], and Adodarhoh shall formally open the Council. Then shall Adodarhoh and his cousin [Chief Statesmen] , the Fire Keepers, announce the subject for discussion, The Smoke of the Confederate Council Fire shall ever ascend and pierce the sky so that other nations who may be allies may see the Council Fire of the Great Peace. Adodarho and his cousin [Chief Statesmen] are entrusted with the Keeping of the Council Fire. (4-IV-TLL). **Wampum 4.** You Adodarho, and your thirteen cousin [Chief	**Message to Congress -- Adjourn and Call Special Session** He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States. *(See also Article I, Section 5.)*

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Statesmen], shall faithfully keep the space about the Council Fire clean and you shall allow neither dust nor dirt to accumulate. I lay a Long Wing before you as a broom. As a weapon against a crawling creature I lay a staff with you so that you may thrust it away from the Council Fire. If you fail to cast it out then call the rest of the United [Chief Statesmen] to your aid. (3-III, TLL).

Wampum 62. When the Confederate Council of the Five [Six] Nations declares for a reading of the belts of shell calling to mind these laws, they shall provide for the reader a specially made mat woven of the fibers of wild hemp. The mat shall not be used again, for such formality is called the honoring of the importance of the law. (XXXVI-36, TLL).

Wampum 63. Should two sons of opposite sides of the council fire agree in a desire to hear the reciting of the laws of the Great Peace and so refresh their memories in the way ordained by the founder of the Confederacy, they shall notify Adodarho. He then shall consult with five of his coactive [Chief Statesmen] and they in turn shall consult their eight brethren. Then should they decide to accede to the request of the two sons from opposite sides of the Council Fire, Adodarhoh shall send messengers to notify the Chief [Statesmen] of each of the Five [Six] Nations. Then they shall dispatch their War Chiefs to notify their brother and cousin [Chief Statesmen] of the meeting and its time and place.

When all have come and have

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The Smoke of the Confederate Council Fire shall ever ascend and pierce the sky so that other nations who may be allies may see the Council Fire of the Great Peace.

Section 4. Removal of Executive and Civil Officers

Impeachment of President and Other Officers

The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, conviction of, treason, bribery, or other high crimes and misdemeanors. See also Article I, Sections 2 and 3.

Should two sons of opposite sides of the council fire agree in a desire to hear the reciting of the laws of the Great Peace and so refresh their memories in the way ordained by the founder of the Confederacy, they shall notify Adodarho.

GREAT LAW OF PEACE

assembled, Adodarhoh, in conjunction with his cousin [Chief Statesmen], shall appoint one [Chief Statesman] who shall repeat the laws of the Great Peace. Then shall they announce who they have chosen to repeat the laws of the Great Peace to the two sons. Then shall the chosen one repeat the laws of the Great Peace. (XLIII-43, TLL).

JUDICIAL COUNCILS

Judical Powers Vested in the Women's Councils, Men's Council's and the General Council Fires of the People.

Council Fires -- Terms of Service and Compensation of Clan Mothers

[The judicial power of the Confederacy is endowed largely in the Women's Councils led by the Clan Mothers who serve for life, subject to good behavior. They receive no money for their service.]

Wampum 95. The women of every clan of the Five [Six] Nations shall have a Council Fire ever burning in readiness for a council of the clan. When in their opinion it seems necessary for the interest of the people they shall hold a council and their decision and recommendation shall be introduced before the Council of [Chief Statesmen] by the War Chief for its consideration. (IV-87, EUC).

Wampum 94. The men of every clan of the Five [Six] Nations shall have a Council Fire ever burning in readiness for a council of the

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[The judicial power of the Confederacy is endowed largely in the Women's Councils led by the Clan Mothers who serve for life, subject to good behavior...]

ARTICLE III. JUDICIAL DEPARTMENT

Section 1. Judicial Powers Vested in Federal Courts

Courts -- Terms of Office and Salary of Judges

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

The women of every clan of the Five [Six] Nations shall have a Council Fire ever burning in readiness for a council of the clan.

GREAT LAW OF PEACE

clan. When it seems necessary for a council to be held to discuss the welfare of the clans, then the men may gather about the fire. This council shall have the same rights as the council of the women. (V-88, EUC).

Jurisdiction of Confederacy Council Fires

Matters That May Come Before Confederacy Council Fires

Wampum 93. Whenever a specially important matter or a great emergency is presented before the Confederate Council and the nature of the matter affects the entire body of Five [Six] Nations, threatening their utter ruin, then the [Chief Statesmen] of the Confederacy must submit the matter to the decision of the people and the decision of the people shall affect the decision of the Confederate Council. This decision shall be a confirmation of the voice of the people. (XV-84, SPW).

> **...the voice of the people...**

Jurisdiction of the General Council and Clan Council Fires

Wampum 96. All the Clan council fires of a nation or the the Five [Six] Nations may unite into one general council fire, or delegates from all the council fires may be appointed to unite in a general council for discussing the interests of the people. The people shall have the right to make appointments and to delegate their

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> **When it seems necessary for a council to be held to discuss the welfare of the clans, then the men may gather about the fire.**

Section 2. Jurisdiction of United States Courts

Cases That May Come Before United States Courts

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more States;--between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects. See also Eleventh Amendment

Jurisdiction of Supreme and Appellate Courts

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction.
In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact with such exceptions, and under such regulations as the Congress shall make.

GREAT LAW OF PEACE

power to others of their number. When their council shall have come to a conclusion on any matter, their decision shall be reported to the Council of the Nation or to the Confederate Council (as the case may require) by the War Chief or the War Chiefs. (VI-89, EUC).

Counselling Those Who Break the Great Law
[If a person breaks the law, the matter may first be addressed by the person's mother and father, then grandmothers and grandfathers who offer counselling. A more serious or repeat offender may require a counselling from the Clan Mother and Women's Council and/or Men's Council. An even more serious matter could go to the Nation's Council and/or Confederacy Council. However, if the person is suffering from a mental or spiritual disorder, certain Medicine Societies may be needed to heal the person. Since no prisons exist, a person who was impossible to reform might be banished from the territory.]

* * *

Treason

Treason Defined
Wampum 92. If a nation, part of a nation, or more than one nation within the Five [Six] Nations should in any way endeavor to destroy the Great Peace by neglect or violating its laws and resolve to dissolve the Confederacy, such a nation or such nations shall be deemed guilty of treason and

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> **Whenever a specially important matter...affects the entire body of Five [Six] Nations... then the [Chief Statesmen] of the Confederacy must submit the matter to the decision of the people...**

Trial of Crimes
3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.
(See also Fifth, Sixth, Seventh, and Eighth Amendments.)

> If a person breaks the law, the matter may first be addressed by the person's mother and father... grandmothers and grandfathers who offer counselling.

Section 3. Treason

Treason Defined
1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

* * *

GREAT LAW OF PEACE

called enemies of the Confederacy and the Great Peace.

Conviction
Wampum 92. (cont.) It shall then be the duty of the [Chief Statesmen who remain faithful to resolve to warn the offending people.

Punishment
Wampum 92. (cont.) They shall be warned once and if a second warning is neccessary they shall be driven from the territory of the Confederacy by the War Chiefs and his men. (III-86, EUC).

THE CLANS, NATIONS AND THE CONFEDERATE GRAND COUNCIL

Sanctioned Acts of the Nations, Clans and People

Being of One Head, One Body and One Mind A large bunch of shell strings [50], in the making of which the Five [Six] Nations Confederate [Chief Statesmen] have equally contributed, shall symbolize the completeness of the union and certify the pledge of the nations represented represented by the Confederate [Chief Statesmen] of the Mohawk, the Oneida, the Onondaga, the Cayuga and the Seneca [and the Tuscarora], that are all united and formed into one body or union called the Union of the Great Law, which they have established...(14-XIV, TLL).

Wampum 56. Five strings of shell tied together as one shall represent the Five Nations. Each string shall represent one

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Conviction
2. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Punishment
3. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV. THE STATES AND THE FEDERAL GOVERNMENT

Section 1. Official Acts of the States

Full Faith and Credit Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.
(See also Fourteenth Amendment.)

> **A large bunch of shell strings [50]...shall symbolize the completeness of the union and certify the pledge of the nations...all united and formed into one body or union called the Union of the Great Law...**

GREAT LAW OF PEACE

territory and the whole a completed united territory known as the Five Nations Confederate territory. (108-XXV, EUC).

Wampum 57. Five arrows shall be bound together very strong and each arrow shall represent one nation. Thus are the Five Nations united completely and enfolded together, united into one head, one body and one mind. Therefore they shall labor, legislate and council together for the interest of future generations... (15-XV, TLL).

Citizens of the Nations

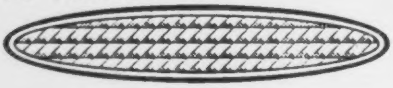
International Privileges of Citizens

Wampum 59. A bunch of wampum shells on strings, three spans of the hand in length, the upper half of the bunch being white and the lower half black, and formed from equal contributions of the men [and women] of the Five [Six] Nations, shall be a token that the men [and women] have combined themselves into one head, one body and one thought, and it shall also symbolize their ratification of the peace pact of the Confederacy, whereby the [Chief Statesmen] of the Five [Six] have established the Great Peace.

The white portion of the shell strings represent the women and the black portion the men...(SPW-81, XII).

Fugitives From Justice

No Reference



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> **Five arrows shall be bound together very strong...**

[The U.S. adopted this symbolism in the national seal which features an eagle holding thirteen arrows representing the original 13 states.]

> **...the Five Nations [are] united completely and enfolded together...into one head, one body and one mind.**

Section. 2. Citizens of the States

Interstate Privileges of Citizens

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

> **A bunch of wampum shells on strings...the upper half...being white and the lower half black...shall be a token that that the men [and women] have combined themselves into one head, onebody and one thought, and...symbolize their ratification of the peace pact...whereby the [Chief Statesmen] of the Five [Six] have established the Great Peace.**

Fugitives From Justice

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State,

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> **The father of a child of great comliness, learning, ability or specially loved... may...select a name...**

Fugitives from Service
No Reference

> **Should any person, a member of the Five [Six] Nations' Confederacy, specially exteem a man or a woman of another clan or of a foreign nation, he may choose a name and bestow it upon that person so esteemed.**

New Nations, Clans and Citizens

Adoption of Nations, Clans and People

Wampum 66. The father of a child of great comliness, learning, ability or specially loved because of some circumstatce may, at the will of the child's clan, select a name from his own (the father's) clan and bestow it by ceremony, such as is provided. This naming shall be only temporary and shall be called, "A name hung about the neck." (XII-96, EUC).

Wampum 67. Should any person, a member of the Five [Six] Nations' Confederacy, specially esteem a man or a woman of another clan or of a foreign nation, he may choose a name and bestow it upon that person so esteemed. The naming shall be in accord with

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shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

Fugitives from Service

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due. *("Person" here includes slave. This was the basis of the Fugitive Slave Laws of 1793 and 1850. It is now superseded by the Thirteenth Amendment, by which slavery is prohibited.)*

Section 3. New States

Admission or Division of States

1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of another State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislature of the States concerned as well as the Congress.

> **...no new State shall be formed...within...another State; nor any State be formed by the junction of two or more States...without...consent of... Legislature...as well as...Congress.**

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the ceremony of bestowing names...A short string of shells shall be delivered with the name as a record and a pledge. (XIV-97, EUC).

Wampum 68. Should any member of the Five [Six] Nations, a family or person belonging to a foreign nation submit a proposal for adoption into a clan of one of the Five [Six] Nations, he or they shall furnish a string of shells, a span in length, as a pledge to the clan into which he or they wish to be adopted. The [Chief Statesmen] of the nation shall then consider the proposal and submit a decision. (XXI-104, EUC).

Wampum 69. Any member of the Five [Six] Nations who through esteem or other feeling wishes to adopt an individual, a family or number of families may offer adoption to him or them and if accepted the matter shall be brought to the attention of the [Chief Statesmen] for confirmation and the [Chief Statesmen] must confirm the adoption. (XXII-105, EUC).

Wampum 70. When the adoption of anyone shall have been confirmed by the [Chief Statesmen] of the Nation, the [Chief Statesmen] shall address the people of their nation and say: "Now you of our nation, be informed that such a person, such a family or such families have ceased forever to bear their birth nation's name and have buried it in the depths of the earth. Henceforth let no one of our nation ever mention the original name or nation of their birth. To do so will be to hasten the end of our peace." (XXIII-106,

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Should any member of the Five [Six] Nations, a family or person belonging to a foreign nation submit a proposal for adoption into a clan of one of the Five [Six] Nations, he or they shall furnish a string of shells, a span in length, as a pledge to the clan into which he or they wish to be adopted. The [Chief Statesmen] of the nation shall then consider the proposal and submit a decision.

Any member of the Five [Six] Nations who through esteem or other feeling wishes to adopt an individual, a family or number of families may offer adoption to him or them and if accepted the matter shall be brought to the attention of the [Chief Statesmen] for confirmation and the [Chief Statesmen] must confirm the adoption.

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EUC).

Wampum 77. When the [Chief Statesmen] of the Confederacy decide to admit a foreign nation and an adoption is made, the [Chief Statesmen] shall inform the adopted nation that its admission is only temporary. They shall also say to the nation that it must never try to control, to interfere with or to injure the Five [Six] Nations nor disregard the Great Peace or any of its rules or customs. That in no way should they cause disturbance or injury. Then shoould the adopted nation disregard these injunctions, their adoption shall be annulled and they shall be expelled...(XXXIX-122, EUC).

Birthright to the Property and Territory of the People

Wampum 73. The soil of the earth from one end of the land to the other is the property of the people who inhabit it. By birthright the Ongwehonweh (Original beings) are the owners of the soil which they own and occupy and none other may hold it. The same law has been held from the oldest times.

The Great Creator has made us of the one blood and of the same soil he made us and as only different tongues constitute different nations he established different hunting grounds and territories and made boundary lines between them. (LXIX-69, TLL).

> The Great Creator has made us of the one blood and of the same soil...

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> **The soil of the earth from one end of the land to the other is the property of the people who inhabit it. By birthright the Ongwehonweh (Original beings) are the owners of the soil...and none other may hold it. The same law has been held from the oldest times.**

Control of the Property and Territory of the Union

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

> **The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States...**

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Protection of the People Guaranteed

Particapatory Democratic Form of Government
Wampum 58. There are now the Five [Six] Nations Confederate [Chief Statesmen] standing with joined hands in a circle...You, the Five [Six] Nations be firm so that if a tree falls upon your joined arms it shall not separate you or weaken your hold. So shall the strength of the union be preserved. (16-XIV, TLL).

ADDING TO THE RAFTERS

Adding to the Rafters, How Proposed and Adopted
Wampum 16. If the conditions which shall arise at any future time call for an addition to or change of this law, the case shall be carefully considered and if a new beam seems necessary or beneficial, the proposed changed shall be voted upon and if adopted it shall be called, "Added to the Rafters." (48-XLVII, TLL).

> **...an addition to or change of this law ...shall be carefully considered and if a new beam seems necessary or beneficial, the proposed changed shall be voted upon and if adopted it shall be called, "Added to the Rafters."**

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Section 4. Protection of States Guaranteed

Republican Form of Government
The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence.

ARTICLE V. AMENDMENTS

Amendments, How Proposed and Adopted
The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed be the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

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GENERAL PROVISIONS

No Public Debt

> **A broad dark belt of wampum of thirty-eight rows, having... white squares all connected with the heart by white rows of been shall be the emblem of the unity of the Five [Six] Nations.**

Supreme Law of the Land

Wampum 60. A broad dark belt of wampum of thirty-eight rows, having a white heart in the center, on either side of which are two white squares all connected with the heart by white rows of been shall be the emblem of the unity of the Five [Six] Nations. [Known as the "Hiawatha Belt, now it is in the Congressional Library.]

The first of the squares on the left represents the Mohawk nation and its territory; the second square on the left and the one near the heart, represents the Oneida nation and its territory; the white heart in the middle represent the Onondaga nation and its territory, and it also means the heart of the Five Nations is single in its loyalty to the Great Peace, that the Great Peace is lodged in the heart (meaning with Onondaga Confederate [Chief Statesmen]), and that the Council Fire is to burn there for the Five Nations, and further, it means that the authority is given to advance the cause of peace whereby hostile nations out of the Confederacy shall cease warfare; the white

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ARTICLE VI. GENERAL PROVISIONS

The Public Debt

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

See also Fourteenth Amendment, Section 4.

Supreme Law of the Land

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

> **This Constitution, and the laws of the United States...and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.**

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square to the right of the heart represents the Cayuga nation and its territory and the fourth and last white square represents the Seneca nation and its territory.

White shall here symbolize that no evil or jealous thoughts shall creep into the minds of the [Chief Statesmen] while in council under the Great Peace. White, the emblem of peace, love, charity and equity surrounds and guards the Five [Six] Nations. (84-EUC, I)

Chief Statesmen Are Both Civil and Religious Leaders

Wampum 100. It shall be the duty of the [Chief Statesmen] of each brotherhood to confer at the approach of the time of the Midwinter Thanksgiving and to notify their people of the approaching festival. They shall hold a council over the matter and arrange its details and begin the Thanksgiving five days after the moon of Dis-ko-nah is new. The people shall assemble at the appointed place and the nephews shall notify the people of the time and the place. From the beginning to the end the [Chief Statesmen] shall preside over the Thanksgiving and address the people from time to time. (XVII-100, EUC)

Wampum 101. It shall be the duty of the appointed managers of the Thanksgiving festivals to do all that is needful for carrying out the duties of the occasions.

The recognized festivals of Thanksgiving shall be the Thanksgiving, the Maple or Sugar-making Thanksgiving, the Raspberry Thanksgiving, the

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> White shall here symbolize that no evil or jealous thoughts shall creep into the minds of the [Chief Statesmen]...under the Great Peace. White, the emblem of peace, love, charity...equity surrounds ...the Five [Six] Nations.

Oath of Office -- No Religious Test Required

3. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

> **It shall be the duty of... [Chief Statesmen]...to confer at...the time of the Midwinter . Thanksgiving and to notify...people of the. approaching festival.**

> ...Senators...Representatives... members of...State Legislatures ...executive and judicial officers, both of the U.S. and... States, shall be bound by oath...to support this Constitution; but no religious test shall ...be required as a qualification to...office or public trust...

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Strawberry Thanksgiving, the Corn-planting Thanksgiving, the Con Hoeing Thanksgiving, the Little Festival of Green Corn, the Great Festival of Ripe Corn and the complete Thanksgiving for the Harvest.

Each nation's festivals shall be held in their Long Houses. (XVIII-101, EUC).

PLEDGE TO UPHOLD THE GREAT LAW OF PEACE

Burying All Weapons of War Beneath the Tree of Peace

Wampum 65. I, [the Peacemaker], and the Union [Chief Statesmen], now uproot the tallest pine tree and into the cavity thereby made we cast all weapons of war. Into the depths of the earth, down into the deep underearth currents of water flowing to unknown regions we cast all the weapons of strife. We bury them from sight and we plant again the tree. Thus shall the Great Peace be established and hostilities shall no longer be known between the Five [Six] Nations but peace to the United People.

> Thus shall the Great Peace be established...

ADDING TO THE RAFTERS

Wampum 99. Religious Ceremonies Protected

The rites and festival of each nation shall remain undisturbed and shall continue as before because they were given by the people of

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> I, [the Peacemaker], and the Union [Chief Statesmen], now uproot the tallest pinee tree and into the cavity thereby made we cast all weapons of war.

ARTICLE VII. RATIFICATION OF THE CONSTITUTION

Ratification of Nine States Required

The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

DONE in convention by unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

George Washington -- Presidt and deputy from Virginia (et.al.)

AMENDMENTS

• AMENDMENT I

Restrictions on Powers of Congress

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

GREAT LAW OF PEACE

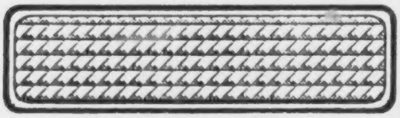
old times as useful and necessary for the good of men [and women]. (XVI-99, TLL).

Wampum 102. When the Thanksgiving for the Green Corn come the special managers, both men and women, shall give it careful attention and do their duties property. (XIX-102, EUC).

Wampum 103. When the Ripe Corn Thanksgiving is celebrated the [Chief Statesmen] of the Nation must give it the same attention as they give to the Midwinter Thanksgiving. (XX-103, EUC).

Wampum 104. Whenever any man [or woman] proves himself [or herself] by his [or her] good life and his [or her] knowledge of good things, naturally fitted as a teacher of good things, he [or she] shall be recognized by the [Chief Statesmen] as a teacher of peace and religion and the people shall hear him or [her]. (X-93, EUC).

Weapons of War
Buried Beneath the Tree of Peace



WAMPUM 107
Protection of the House

A certain sign shall be known to all the people of the Five [Six] Nations which shall denote that the owner or occupant of a house is absent. A stick or pole in a slanting or leaning position shall indicate this and be the sign. Every person not entitled to enter the house by right of living within it upon seeing such a sign shall not

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freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Whenever any man [or woman] proves...fitted as a teacher of good things, he [or she] shall be recognized...as a teacher of peace and religion and the people shall hear...

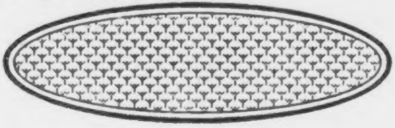
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II
Right to Bear Arms

A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III
Billeting of Soldiers

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be precribed by law.

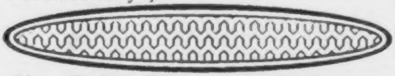


GREAT LAW OF PEACE

> The people have the right to be heard before the Council Fires... of the Confederacy...
>
> ...the right of trial by jury shall be preserved...

Wampums 93-98
Hearing Before Council Fire

[The people have the right to be heard before the Council Fires of the men of their clan, the women of their clan, the Chief Statesmen of their nation, as well as the Chief Statesmen of the Confederacy.]



No Bails--Wampum Compensation--Punishments

[The concept of bail is foreign. Wampum Compensation is a for of repayment of crimes to overcome the desire for revenge, especially to prevent blood revenge involving capital crimes.]

WAMPUM
Certain Rights Not Denied to the People

This string of wampum vest the people with the right to correct their erring [Chief Statesmen]. In case a part of all the [Chief Statesmen] pursue a course not vouched for by the people and heed not the third warning of their women relatives, then the matter shall be taken to the General Council of the women of the Five [Six] Nations. If the [Chief Statesmen]

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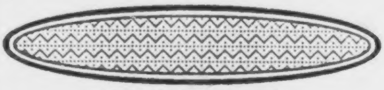
impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII
Trial by Jury

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

AMENDMENT VIII
Bails--Fines--Punishments

Excessive bail shall not be required, nor cruel and unusual punishments inflicted.



AMENDMENT IX
Certain Rights Not Denied to the People

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

> This string of wampum vest the people with the right to correct their erring [Chief Statesmen].

GREAT LAW OF PEACE

notified and warned three times fail to heed, then the case falls into the hands of the men of the Five [Six] Nations. The War Chiefs shall then, by right of such power and authority, enter the open council to warn the [Chief Statesmen] to return from their wrong course. If the Lords heed the warning they shall say, "we will reply tomorrow." If then an answer is returned in favor of justice and in accord with this Great Law, then the [Chief Statesmen] shall individually pledge themselves again by again furnishing the necessary shells for the pledge. Then shall the War Chief or Chiefs exhort the [Chief Statesmen] urging them to be just and true... (SPW-81, XII).

Wampum 61. Should a great calamity threaten the generations rising and living of the Five [Six] United Nations, then he who is able to climb to the top of the Tree of the Great Long Leaves may do so. When then, he reaches the top of the Tree he shall look about in all directions and, should he see that evil things indeed are approaching, then he shall call to the people of the Five [Six] United Nations assembled beneath the Tree of the Great Long Leaves and say: "A calamity threatens your happiness."

Then shall the [Chief Statesmen] convene in council and discuss the impending evil.

When all the truths relating to the trouble shall be fully known and found to be truths, then shall the people seek out a Tree of Ka-hon-ka-ah-go-nah (Great Swamp Elm), and when they shall find it

U.S. CONSTITUTION

Should a great clamity threaten the generations rising and living of the Five [Six] United Nations, then he who is able to climb to the top of the Tree of the Great Long Leaves may do so. When then, he reaches the top of the Tree he shall look about in all directions and, should he see that evil things indeed are approaching, then he shall call to the people of the Five [Six] United Ntions assembled beneath the Tree of the Great Long Leaves and say: "A calamity threatens your happiness."

Then shall the [Chief Statesmen] convene in council and discuss the impending evil.

GREAT LAW OF PEACE

they shall assemble their heads together and lodge for a time between its roots. Then their labors being finished, the may hope for happiness for many days after. (II-85, EUC).

HUMAN, FAMILY, CLAN, NATIONAL AND NATURAL RIGHTS

[Ever human being who is a member of a family, clan and a nation has certain responsibilities and rights. Everyone has a responsibility to help protect and to preserve the earth, Our Mother, for the benefit of her children seven generations to come. Everyone has the right to be free to come and to go, free to live in harmony with the laws of nature, free to enjoy liberty to exist in a natural way, as long as one continues to gives thanks for all land and life.]

U.S. CONSTITUTION

When...the truths relating to the trouble shall be fully known...then shall the people seek out a Tree of Ka-hon-ka-ah-go-nah...

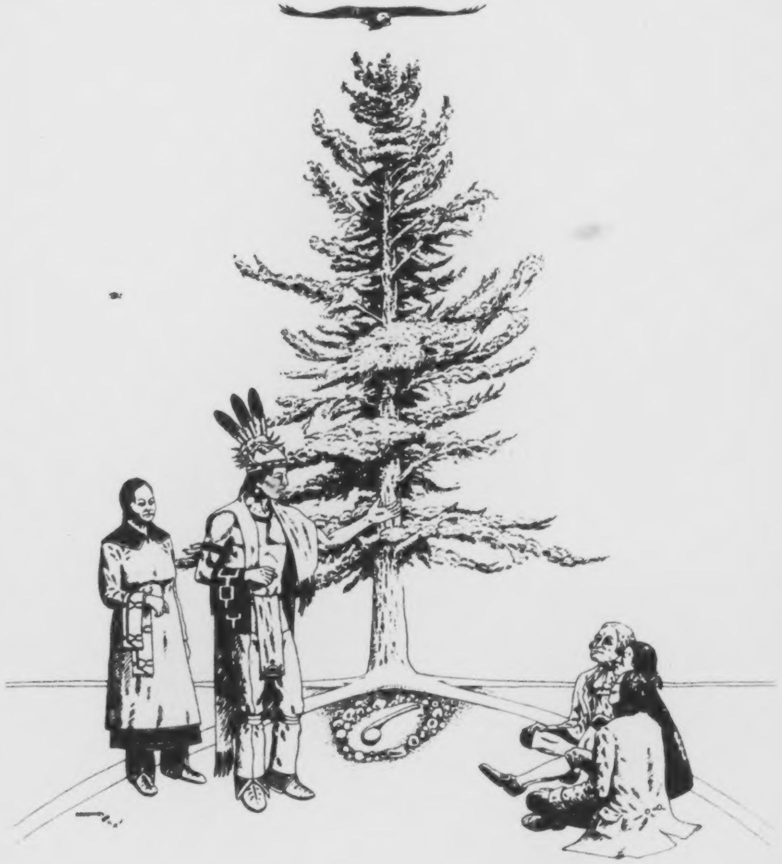
AMENDMENT X
State Rights

The powers not delegated to the United States by Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Everyone has a responsibility to help... preserve the earth, Our Mother, for the benefit of her children seven generations to come.

p23

THE GREAT LAW OF PEACE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA



Introduction

"The Birth of Frontier Democracy from an Eagle's Eye View: The Great Law of Peace to The Constitution of the United States of America"

by Gregory Schaaf, Ph.D.

From the time of the signing of the Declaration of Independence to the ratification of the U.S. Constitution, the opportunity to create and to establish a new government challenged people to search for the roots of democracy. One of the little known secrets of the Founding Fathers is the fact that they discovered a democratic model *not* in Great Britain, France, Italy, nor any of the so-called "cradles of civilization." Thomas Jefferson, Benjamin Franklin and others found the oldest participatory democracies on earth among the American Indians.[1]

Representatives of the U.S. Congress met privately with ambassadors from the Haudenasaunee Six Nations Confederacy, as well as the Lenni Lenape, "Grandfathers" of the Algonquian family of nations. For centuries these American Indian people were governed by democratic principles. Through wampum diplomacy, their traditional philosophy of liberty was advanced in a series of peace talks focused on the law of the land, the balance of power and the inherent rights of the people.[2]

American Indian Agent George Morgan and others served as intermediaries in these talks. His role as a diplomat demanded an intimate knowledge of the cultures, social structures and governments of the American Indians. He travelled safely through Indian communities and met with Indian leaders of frontier democracies. He witnessed societies where people were endowed with the right to speak freely, the right to assemble, religious freedom, as well as the separation of governmental powers into three branches.[3]

A system of checks and balances was firmly in place like the branches of the great "Tree of Peace" among the Haudenausaunee, "People of the Longhouse." The United States government was structured surprisingly similar to their Grand Council.[4]

SEATING PATTERN OF IROQUOIAN GRAND COUNCIL

The Onondaga, led by Tatadaho the Firekeeper at the heart of the Confederacy, paralleled the presidency of the U.S. executive branch. Their legislative branch was divided into two parts. The Mohawk and Seneca, united as Elder Brothers, formed the upper house of the traditional Senate. The Oneida and Cayuga, composed the Younger Brothers, similar to the House of Representatives.[5]

After meeting with representatives of the Six Nations in the summer of 1754, Benjamin Franklin first proposed the creation of a colonial Grand Council in the "Albany Plan of Union.":

> "One General Government may be formed in America. ...administered by a president General...and a grand Council to be chosen by the representatives of the people of the several colonies..."[6]

Franklin's plan for a Grand Council of United Colonies clearly resembled the Grand Council of the united Haudenausaunee.

Why did the Founding Fathers choose to keep secret the original design of the United States government? One clue may be related to a major difference between Iroquoian vs U.S.'s judicial branches. The Iroquoian 'supreme court' was entrusted to the women. Clan Mothers and Women's Councils maintained a balance of power in their matrilineal society. Women nominated chief statesmen as political and religious leaders, lending a maternal insight into good leadership qualities. Their standards were set very high. While under the U.S. Constitution, qualifications of Congressmen were limited to age, citizenship and residency, Iroquoian women moreover required:

> All royaneh (Chief Statesmen) of the Five Nations must be honest in all things. They must not idle or gossip, but be men possessing those honorable qualities...Their hearts shall be full of peace and good will and their minds filled with a yearning for the welfare of the people of the Confederacy...[7]

Women also held the power to impeach any leader who failed — after three warnings — to serve the best interests of the people. If the Founding Fathers had disclosed the political powers of many Indian women, perhaps women like Abigail Adams, wife of future President John Adams, could have effectively assumed positions as "Founding Mothers." White women could have argued they deserved, at least, equal rights with American Indian women.

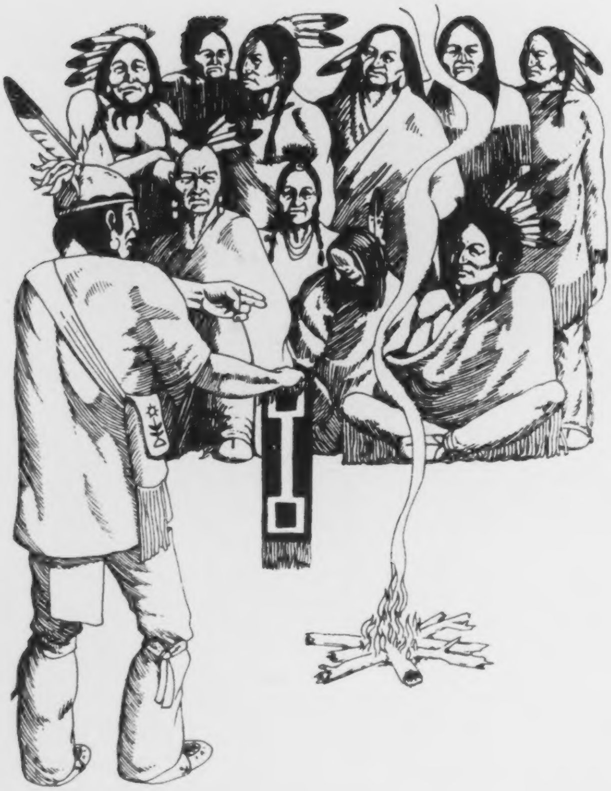
In behalf of the people, women preserved title to the land through families and clans. This may be another facet of the Iroquoian system which some Founding Fathers may have preferred not to make public. In contrast, women in the United States were not permitted the right to own land, nor even to vote, much less control over the system of justice. Iroquoian women also maintained a sort of veto power to stop wars. If women across the land had known the truth about the power of Indian women, the call for equal rights could have been heard earlier, and American history might have changed over the past two hundred years.[8]

Two generations ago, Dr. Paul Wallace, a respected ethnohistorian in Iroquoian and Algonquian studies, traced the source of the first "United Nations".[9] When I retraced these roots to Onondaga and then to Akwesasne, I was impressed by a stone monument to Dr. Wallace which stands before the Akwesasne Mohawk Longhouse. On the top was engraved the Tree of Peace followed by these words:

TO AMERICA'S OLDEST ALLY
THE IROQUOIS CONFEDERACY
"PEOPLE OF THE LONG HOUSE"
Mohawks, Oneida, Onondaga, Cayugas,
Senecas — To Whom Were Later Added
The Tuscaroras Constituting
THE SIX NATIONS
Founded by Deganawidah and Hiawatha who
planted the Tree of Peace at Onondaga (Syracuse)
sometime before the coming of Columbus.

THEY EXCELLED IN STATESMANSHIP AND THE
ART OF DIPLOMACY. AFTER THE WHITE MAN
CAME, DURING MORE THAN A CENTURY OF INTERCOLONIAL STRIFE, THEY LOYALLY PROTECED
THE INFANT ENGLISH COLONIES, SHOWED THEM
THE WAY TO UNION, AND SO HELPED PREPARE
THE AMERICAN AND CANADIAN PEOPLE FOR NATIONHOOD.

IN MEMORY OF OUR BELOVED BROTHER
TO—RI—WA—WA—KON (Dr. Paul A.
Wallace) WHO, THROUGH HIS WRITINGS,
SHOWED THE IROQUOIS CONFEDERACY AS
IT TRULY EXISTED.
THANK YOU,
TORIWAWAKON, FOR YOUR GREAT
WORK.[10]



The Great Law of Peace is founded upon a basic respect for the opinions of all people. Consensus was the means by which decisions were made

Torlwawakon literally means, "He Holds the Matters," which implies that he held in his hands matters related to the core of Iroquoian society.

Dr. Wallace began the story by recognizing the Iroquois as the "famous Indian confederacy that provided a model for, and an incentive to, the transformation of the thirteen colonies into the United States of America."[11] Over a thousand years ago, according to Iroquois faithkeepers, a Great Peacemaker emerged at the time of a terrible war. He inspired the warriors to bury their weapons of war beneath a sacred Tree of Peace. An eagle soared from the heavens, perched on top of the tree and clutched the arrows to symbolize the united Indian nations. (The U.S. national seal, pictured on the back of the one dollar bill, features 13 arrows for the 13 original United States.)[12]

The Haudenosaunee have preserved a story of the origins of the Tree of Peace. At the planting of a Tree of Peace at Philadelphia in 1986, Mohawk Chief Jake Swamp explained through interpreter Chief Tom Porter:

> In the beginning of time, when our Creator made the human beings, everything needed to survive in the future was created. Our Creator asked only one thing: Never forget to be appreciative of the gifts of Mother Earth. Our people were instructed how to be grateful and how to survive. But at one time, during a dark age in our history perhaps over 1000 years ago, human beings no longer listened to the original instructions. Our Creator became sad, because there was so much crime, dishonesty, injustice and so many wars. So our Creator sent a Great Peacemaker with a message to be righteous and just and to make a good furture for our children seven generations to come. He called all the warring people together, and told them as long as there was killing, there would never be peace of mind. There must be a concerted effort by human beings, an orchestrated effort, for peace to prevail. Through logic, reasoning and spiritual means, he inspired the warriors to bury their weapons (the origin of the saying to "bury the hatchet") and planted on top a sacred Tree of Peace."[13]

Upon hearing this story, Dr. Robert Muller, former Assistant Secretary General of the United Nations, responded, "This profound action stands as perhaps the oldest effort for disarmament in world history."[14]

The Peacemaker provided the people with a code of justice called the *Great Law of Peace*.[15] His vision had all the people of the world joining hands in a way of life based on the principle that peace is the law of the land. He created a united government which still meets around the council fire at Onondaga, near present-day Syracuse, New York.

The rights of the people, according to Onondaga Faithkeeper Oren Lyons, include, "freedom of speech, freedom of religion, and the rights of women to participate in government. The concept of separation of powers in government and checks and balances of power within governments are traceable to our consitution. These are ideas learned by the colonists..."[16]

Over 200 years ago an Onondaga chief advised Benjamin Franklin and other colonial representatives saying, "Our wise Forefathers established Union and Amity...this made us formidable...We are a powerful Confederacy, and if you observe the same methods...you will acquire fresh Strength and Power."[17]

Franklin challenged the colonists to create a similar united government:

> It would be a strange thing if (the) Six Nations should be capable of forming...such a union...and yet a like union should be impracticable for...a dozen English colonies.[18]

The result of Franklin's challenge was the creation of the United States of America with a Bill of Rights and Constitution based on the Great Law as symbolized by the Tree of Peace.

In fact, the first U.S. - Indian peace treaty in 1776 took place beneath a Tree of Peace, as documented in the Morgan Papers - the documents of the American Indian agent who recorded how the Indian elders tried to promote peace during the Revolutionary War.[19] In the spring of 1776, the Continental Congress decided to retrace the White Roots of Peace by appointing the first Indian Agent, George Morgan, to promote peace among the Indian nations.[20] John Hancock, the President of Congress, instructed Morgan to take a "great peace belt with 13 diamonds and 2,500 wampum beads," following the custom of the Peacemaker when inviting the Indians to attend the first U.S. - Indian Peace Treaty.[21] The details of the wampum diplomacy --which featured the philosophical roots of the Great Law of Peace and the U.S. Constitution –came to light with the discovery Morgan Papers.[22] Found in an old trunk in the attic of 94-year-old Susannah Morgan, the collection features original documents by George Washington, Thomas Jefferson, John Hancock and Morgan's private journal which prove the Iroquois Confederacy advocated peace and neutrality early in the Revolution. To symbolize the American promise that Indians would never be forced to fight in the wars of the U.S. and that Indian land rights would be respected, the American Indian Commissioners presented the chiefs and clan mothers with the 13 diamond wampum belt. Symbolically, the war hatchet was then buried beneath the Tree of Peace, and prayers of peace were offered through the sacred pipe.[23]

The Tree of Peace thus became the Tree of Liberty, and the Eagle atop clutched 13 arrows for the 13 states. While the Iroquois shared the Peacemaker's plan for creating a strong united government which influenced the U.S. Constitution. Washington also wanted Iroquois men to fight in the war and Iroquois land for American expansion. The Six Nations were forced to take a stand against the U.S. for their own freedom and liberty.[24]

Based on the *Great Law of Peace*, the Peacemaker founded a participatory democracy in which the people have the right to actively participate and to determine their own future. The Iroquois Constitution laid the foundation for a government of the people with three branches. The democratic government of the Lenni Lenape, Grandfathers of the Algonquian family of nations, also guaranteed freedom of religion, freedom of speech, and freedom of assembly long before these rights were extended to American citizens.[25] As acknowledged in the writings of Benjamin Franklin, George Morgan and other founding fathers, frontier democracy clearly influenced the framers of the U.S. Constitution.

Iroquoian elders have long claimed their government served as a model for the United States. To put their tradition to a test, appropriate passages from the *Great Law of Peace* have been positioned side-by-side with the Constitution of the United States of America. The results proved striking. The parallels are unmistakable. Moreover, the differences proved even more interesting. Featuring high qualifications for leadership, political rights for women and a remarkable system of justice, the *Great law of Peace* may inspire people to reconsider the founding principles of America's origins.

1. Two main schools of thought have dominated scholarly interpretation. The Imperial school looked east primarily to British institutions and French philosophy by Rousseau, Locke and others. The Frontier school, led by Frederick Jackson Turner, looked west to sectional influences. This study draws a focus on the influence of American Indians, particularly the Iroquoian and Algonquian nations known collectively as the Eastern Woodland cultures.

2. Transcripts of meetings between the U.S. and Indian ambassadors during the American Revolution were compiled by John P. Butler, **Index: The Papers of the Continental Congress: 1774-1789** (Washington, D.C., 1978), v. II.

3. George Morgan's eyewitness account of Indian Affairs during the American Revolution is the topic of a manuscript soon to be published by Gregory Schaaf, (1987).

4. The "Seating Chart" of the Grand Council is illustrated in Mike (Kanentakeron) Mitchell, Barbara (Kawenehe) Barnes, eds., et. al., Roy Buck, "The Great Law," **Traditional Teachings** (North American Indian Travelling College, Cornwall Island, Ont., 1984), p. 37. The chart was developed by the author to include the Women's Council. The comparison with U.S. branches of government was first explained to the author by the late Onondaga historian, Lee Lyons.

5. For an introduction to the founding of the confederacy see the accounts compiled by Seneca scholar, Arthur C. Parker, "The Constitution of the Five Nations or the Iroquois Book of the Great Law," (Albany, N.Y., April 1, 1916), No. 184, 175 pp. (hereafter cited Parker, **Great Law**)

6. Benjamin Franklin, "Albany Plan of Union", (Albany, N.Y., July 10, 1754). Queen's State Paper Office; British Museum, London, "New York Papers," Bundle Kk, No. 20, edited by E.B. O'Callaghan, (Albany, N.Y., 1855), v. VI,pp. 853-92.

7. Seth Newhouse, Mohawk, edited by Albert Cusick, Onondaga-Tuscarora, "The Council of the Great Peace: The Great Binding Law, Gayanashagowa," Wampum 27, originally coded 45-XLV, Tree of the Long Leaves (TLL), printed in Parker, **Great Law**, p. 38.

8. The Women's suffrage movement finally succeeded in establishing the XIX Amendment to the U.S. Constitution, certified August 20, 1920, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have the power to enforce this article by appropriate legislation."

9. Paul Wallace, **The White Roots of Peace** (Philadelphia, 1946, reprinted by Chancy Press with prologue by John Mohawk and illustrated by Kahionhes, John Fadden, 1986). (hereafter cited Wallace, **White Roots**)

10. According to Mohawk Chief Jake Swamp, the monument was designed by Tehanetorens, Ray Fadden, the Mohawk senior historian who established the Six Nations Indian Museum, Onchiota, N.Y.

11. Wallace, **White Roots**, p.3.

12. Dr. Donald Grinde and Paula Underwood Spencer, two scholars presently researching parallels between the Great Law and the U.S. Constitution, mentioned to the author that a document has been found in which Jefferson made notations regarding the symbolic origins of the bundle of arrows.

13. Chief Jake Swamp (translated by Chief Tom Porter), "The Origins of the Tree of Peace" (Friends Meeting Hall, Philadelphia, October, 1985), tape 1 side 1, transcribed by Mary Beth Miller.

14. Dr. Robert Muller, "A Vision of Peace", foreword to Gregory Schaaf, **The Morgan Papers: War and Revolution — Peace and Friendship** (1987).

15. There are six versions of the *Great Law of Peace* and the founding of the Iroquois Confederacy:

1. *The Newhouse version*, gathered and prepared by Seth Newhouse, a Canadian-Mohawk, and revised by Albert Cusick, a New York Onondaga-Tuscarora. This version has been edited by Parker, **Great Law**. Parker explained his system of footnotes as follows: "The abbreviations after each law refer to the sections in the original code and their numbers. TLL, means Tree of the Long Leaves; EUC, Emblematical Union Compact, and LPW, Skanawita's Laws of Peace and War. The first number in Roman numerals refers to the original number of the law, the second number, in Arabic numerals, to the section number in the division of the law named by the abbreviation following."
2. *The Chiefs' version*, compiled by the chief of the Six Nations Council on the Six Nations Reserve, Ontario, 1900. This version appears in the "Traditional History of the Confederacy of the Six Nations," edited by Duncan C. Scott, **Proceedings and Transactions of the Royal Society of Canada** (Ottawa, 1911), v. 5.
3. *The Gibson version*, dictated in 1899 by Chief John Arthur Gibson of the Six Nations Reserve to the late J.N.B. Hewitt of the Smithsonian Institution, and revised by Chiefs Abraham Charles, John Buck, Sr., and Joshua Buck, from 1900 to 1914. This version, which was translated into English in 1941 by Dr. William N. Fenton of the Bureau of American Ethnology, Smithsonian Institution, with help of Chief Simeon Gibson.
4. *The Wallace version*, a compilation of the first three and presented as a narrative by Dr. Paul Wallace, **The White Roots of Peace (Philadelphia, 1946).**
5. *The Buck version*, by Roy Buck, Cayuga, narrated in Mohawk and translated to English by the North American Indian Travelling College Staff, "The Great Law," **Traditional Teachings** (North American Indian Travelling College, Cornwall Island, Ont., 1984)
6. *Mohawk version*, a contemporary interpretation by John C. Mohawk, Doctoral Candidate at State University of New York at Buffalo and editor for seven years of **Akwesasne Notes**.

16. Oren Lyons, "Elders Circle Communique," (1986).

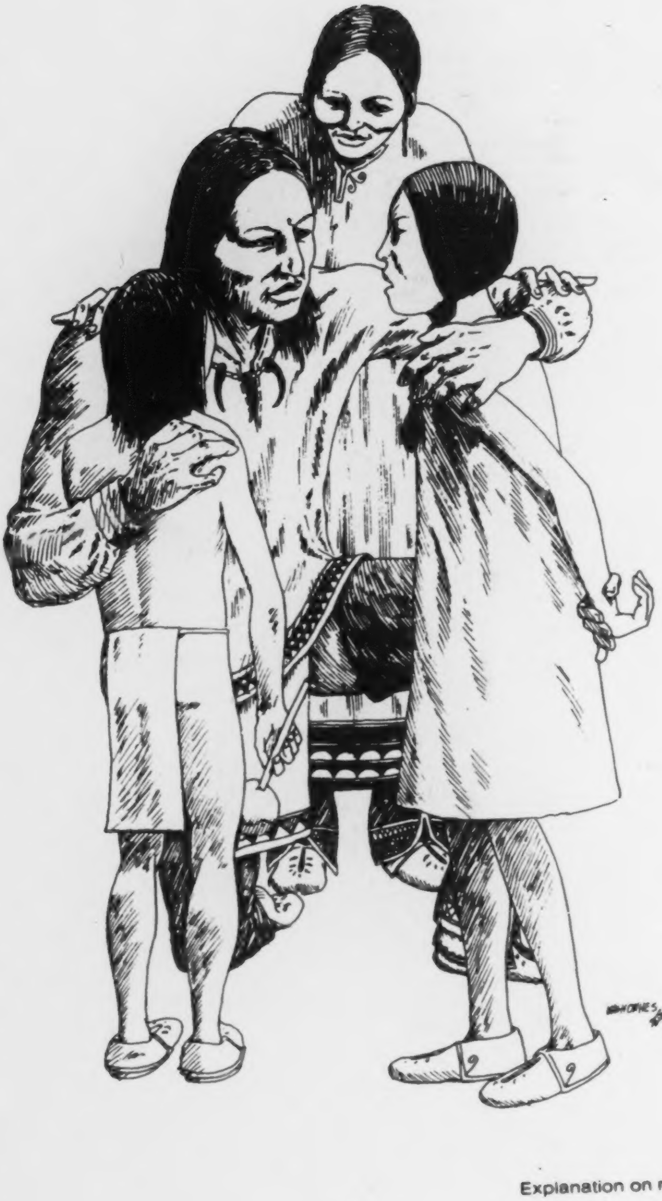
17. Cannasatego to Colonial Officials, Treaty of Lancaster, **Pennsylvania Colonial Archives**.

18. Benjamin Franklin, the author found this quotation in Wallace **White Roots**, p. 3.

19. George Morgan, **Private Journal (April — November, 1776), 73 pp., doc. 8, Morgan Papers**, preserved in a bank vault in Santa Barbara, CA., by the Colonel George Morgan Document Company.

20. John Hancock to George Morgan (Philadelphia, PA., April 19, 1776) doc. 2, **Morgan Papers**, 3pp.

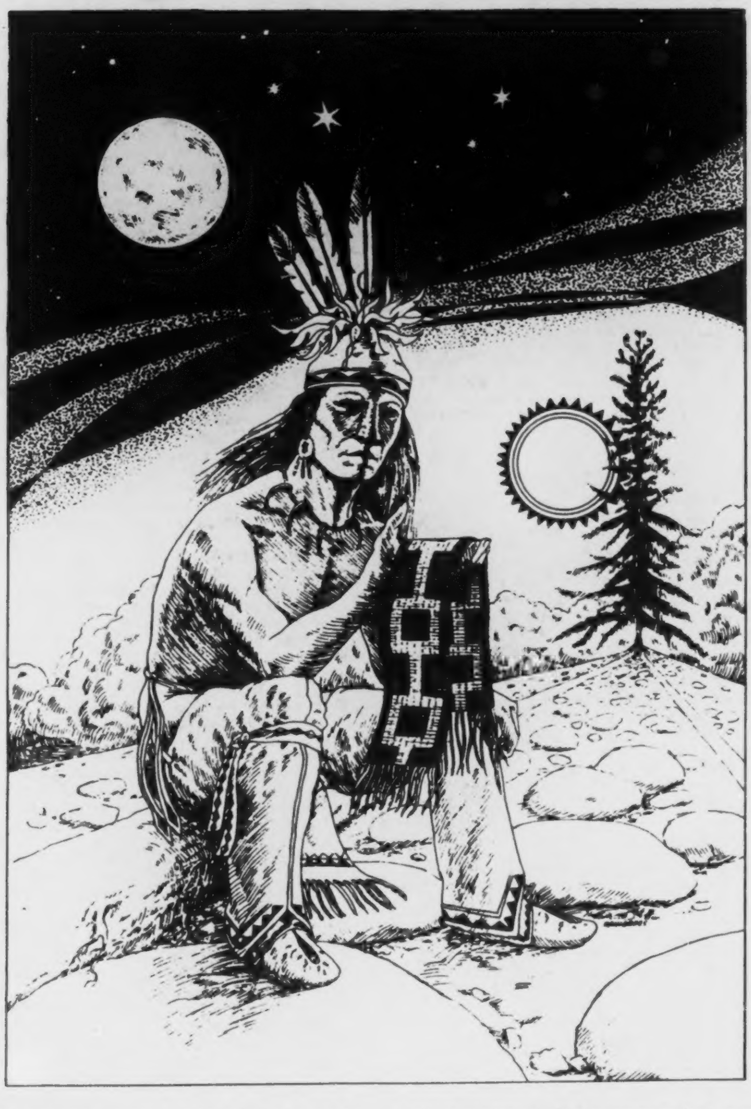
21. For an account of the origin of wampum see, Michael Kanentakeron Mitchell, Mohawk, "The Birth of the Peacemaker," **Traditional Teachings** (North American Indian Travelling College, Cornwall Island,



Explanation on next page.

The Haudenausaunee were instructed to make all decisions with the well being of the seventh generation in mind. By this process no one generation could cause undue harm to the Creation.

Ont., 1984), v. II, p. 22-28
22. Louis Thompson, "Historian Gregory Schaaf a Mother Lode of History Among a Neighbor's Keepsakes," **People Magazine** (January 24, 1977), pp. 20-22.
23. U.S. officials promised Indian leaders at the 1776 Peace Treaty, that Indians would never be forced to fight in U.S. wars. This promise recently has been called over the issue of young Indian men being denied college scholarships for refusing to register for the draft.
24. General George Washington's lobbying efforts to sway a secret committee of Congress to allow him to recruit Indian soldiers are documented
25. The traditions of the Lenni Lenape are the subject of an upcoming trilogy by Gregory Schaaf. **The Grandfathers**.



The Haudenausaunee used wampum belts made of the quohog sea shell which was drilled into beads and strung into different patterns as a means of preserving history. The wampum belt concept was developed by Aiionwatha, one of the founders of the Confederacy

GREAT LAW OF PEACE KAIANEREKOWA

of the Haudenausaunee, Iroquois Confederacy

(Founded by the Great Peacemaker, 10th — 15th Century)

Opening Oration (Wampums 1,2,3)

I am, [the Peacemaker]...with the statesmen of the League of Five Nations, plant the Tree of Peace...Roots have spread out... their nature is Peace and Strength. We place at the top of the Tree of Peace an eagle... If he sees in the distance any danger threatening, he will at once warn the people of the League. If any man or any nation outside the Five Nations shall obey the laws of the Great Peace...they may trace back the roots to the Tree...[and] be welcomed to take shelter. The smoke of the Council Fire of the league shall ever ascend and pierce the sky so that other nations who may be allies may see the Council Fire of the Great Peace [the eternal flame of liberty at the center of the United Nations].

Wampum 9. Grand Council

I0-X, TLL

Powers are Vested in the Elder Brothers and Younger Brothers

I. All the business of the Five Nations Confederate Council shall be conducted by the combined bodies of the Confederate [Chief Statesmen]. First the question shall be passed upon by the Mohawk and Seneca [Chief Statesmen - the Elder Brothers], then it shall be discussed and passed by the Oneida and Cayuga [Chief Statesmen, who later added the Tuscarora, thus the Confederacy became th Six Nations].

Wampum I7. Grand Council

Selection of Chief Statesmen

1. The right of bestowing the title [of Chief Statesman] shall be hereditary in the family[1]...the females of the family have the proprietary right to the [Chief Statesmanship] title for all time to come...(thus the women nominate the chiefs who hold office as long as the women judge him to be fulfilling his responsibility.

Qualifications of Chief Statesmen

Wampum 27. All [Chief Statesmen] of the Five Nations Confederacy must be honest in all things...men possessing those honorable qualities that make true royaneh [chief statesmen, literally "noble leaders who walk in greatness"]. [There are no age limits, but statesmen with a family and are citizens of one of the Five, now Six Nations, with exception to the Pine Tree Chief. The clan mothers and women evaluate who is qualified to be a chief statesman.]

Wampum 53. When the Royaneh women, holders of a [chief statesman] title, select one of their sons as a candidate, they shall select one who is trustworthy, or good character, of honest disposition, one who manages his own affairs, supports his own family, if any, and who has proven a faithful man to his Nation.

Apportionment of Chief Statesmen

[The number of Chief Statesmen was set by the Peacemaker, not apportioned by population. No direct taxes existed. Slavery was illegal. The idea of some people being considered less than whole was foreign

U.S. Constitution

Constitution of the
United States
(In Convention,
September I7, I787)

Preamble

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article I. Legislative Department

Section I. Congress

Powers are Vested in Senate and House

I. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. House of Representatives

Election of Representatives

I.The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the Legislature.

Qualifications of Representatives

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state which he shall be chosen.

Apportionment of Representatives

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to their whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Caroline five and Georgia three. (This clause has been superceded, so far as it relates to representation by Section 2 of the Fourteenth Amendment to the Constitution.) Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to

and never accepted.
Note "Indians not taxed" were considered separate, a status still widely asserted and defended.]

"According to the great immutable law the Iroquois confederate council was to consist of fifty rodiyaner (civil chiefs) [or Chief Statesmen]" (Parker, p. 10):

Elder Brothers:

Onondaga [Many Hill Nation] — 14
Mohawk/Ka-nin-ke-a-ka
[People of the Flint] — 9
Seneca — 8
Younger Brothers:
Oneida [People of the Standing Stone — 9
Cayuga [People of the Pipe] — 10
Tuscarora added in 18th cen.
Number of Chief Statesmen: 50

[Tuscarora, Delaware, Saponi, Tutelo and Nanticoke speak through the Younger Brothers]

Vacancies

Wampum 19. When the [Chief Statesman] is deposed [or vacates position] the women shall notify the [Grand Council] through their [runner of their clan], and the [Grand Council] shall sanction the act. The women will then select another of their sons as a candidate and the [Chief Statesmen]

Chiefs of the Grand Council — Speaker of the Grand Council

Wampum 14. When the Council of the Five [Six] Nations [Chief Statesmen] convene, they shall appoint a speaker for the day. He shall be a [Chief Statesman] of either the Mohawk, Onondaga or Seneca Nation. The next day the Council shall appoint another speaker, but the first speaker may be reappointed if there is no objection, but a speaker's term shall not be regarded more than for the day.

Chiefs of the Grand Council — Impeachment

Wampum 19. If at any time it shall be manifest that a [Chief Statesman] has not in mind the welfare of the people or disobeys the rules of this Great Law, the men or the women of the Confederacy, or both jointly, shall come to the Council and upbraid [unseat] the erring [Chief Statesman] through [a man who has no pity].

Wampum 5. The Elder Brothers
Number of Chief Statesmen

The Council of the Mohawk shall be divided into three parties [each has 3 chiefs totalling 9 chiefs] [The Council of the Seneca shall be divided into 4 parties [each has 2 chiefs totalling 8 chiefs].
[Together, the Mohawk and Seneca parallel the Senate. The chiefs are chosen by the women and hold the position as long as they serve faithfully. Each has an equal voice, but decisions are formed by consensus.]

Clans and Consanguinity

Wampum 42. Among the Fve Nations and their posterity there shall be the following original clans: Great Name Bearer, Ancient Name Bearer, Great Bear, Turtle, Painted Turtle, Standing Rock, Large Plover, Little Plover, Deer, Pigeon Hawk, Eel, Ball, Opposite-Side-of-the-Hand, and Wild Potatoes. These clans distributed through their respective Nations, shall be the sole owners and holders of the soil of the country and in them is it vested as a birthright. (94-XI, EUC).

any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Vacancies

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

Officers of the House -- Speaker of the House

5. The House of Representatives shall choose their Speaker and other officers;

Officers of the House -- Impeachment

and shall have the sole power of impeachment.

Section 3. The Senate
Number of Senators

I. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.
(Superseded by Amendment XVII) Proposed May I3, I9I2; ratified April 8, I9I3; certified May 3I, I9I3.

Classification of Senators

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second; and if vacancies happen by resignation, or otherwise during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.
(modified by Ammendment XVII)

Qualification of Senators

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

President of Senate

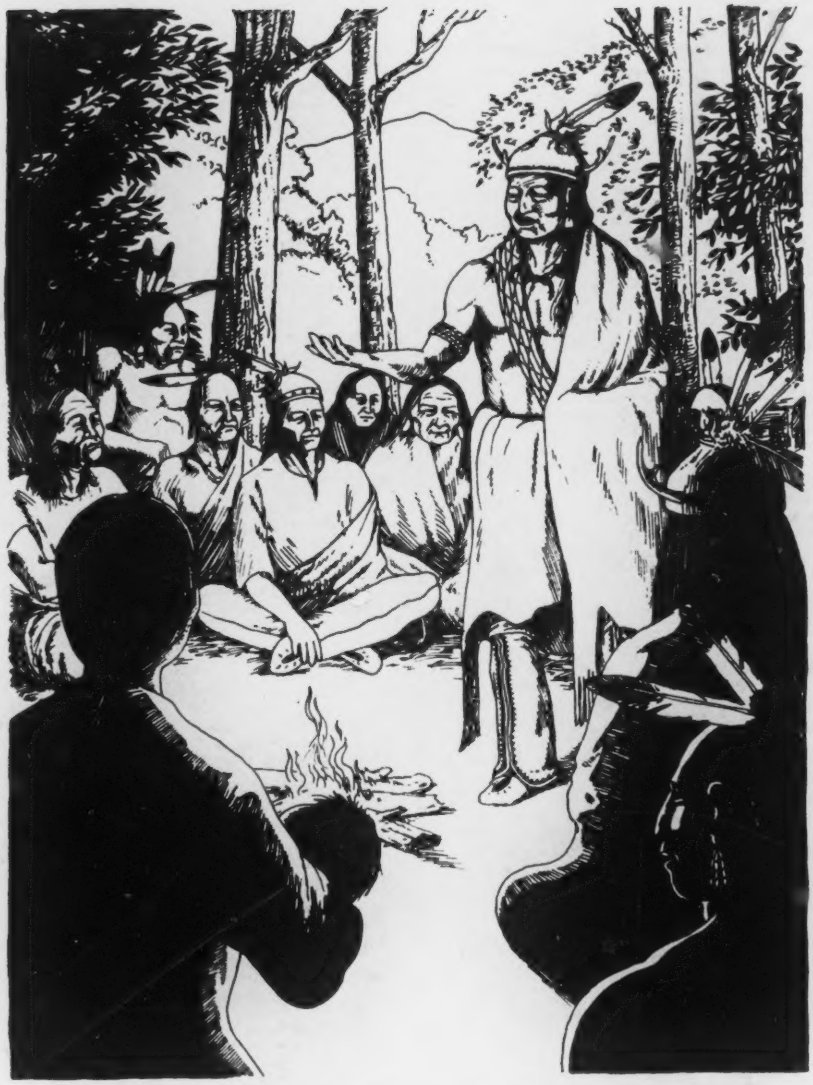
4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

Officers of Senate

5. The Senate shall choose their other officers, and also a President pro Tempore, in the absence of the Vice President or when he shall exercise the office of President of the United States.

Trial of Impeachment

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried the Chief Justice shall preside.



Haudenausaunee delegates meet with American representatives to discuss the Great Law of Peace, circa 1776.

Wampum 44. The lineal descent of the people of the Five Nations shall run in the female line.

Women shall be considered the progenitors of the Nation. They shall own the land and the soil.

Men and women shall follow the status of the mother. (60-LX, TLL).

Wampum 45. The women heirs of the Confederate [Chief Statesman] titles shall be called Royaneh (Noble) for all time to come. (61-LXI, TLL).

Wampum 46. The women of the Forty Eight (now fifty) Royaneh families shall be the heirs of the Authorized Names for all time to come.

Wampum 35. Election of Pine Tree chiefs — Should any man of the Nation assist with special ability or show great interest in the affairs of the nations, if he proves himself wise, honest and worthy of confidence, the Confederate [Chief Statesmen] may elect him to a seat with them and he may sit in the Confederate Council. He shall be proclaimed a *Pine Tree sprung up for the Nation* and be installed as such at the next assembly for the installation of the [Chief Statesmen]. (LXVIII-68,TLL).

Qualifications of Chief Statesman

Wampum 24. The [Chief Statesmen] of the Confederacy of the Five Nations shall be mentors of the people for all time. The thickness of their skin shall be seven spans — which is to say that they shall be proof against anger, offensive actions and criticism.

Their hearts shall be full of peace and good will and their minds filled with a yearning for the welfare of the people of the Confederacy. With endless patience they shall carry out their duty and their firmness shall be tempered with a tenderness for their people. Neither anger nor fury shall find lodgement in their minds and all their words and actions shall be marked by calm deliberation. (33-XXXIII, TLL).

Wampum 27. All [Chief Statesmen] of the Five Nations must be honest in all things. They must not idle or gossip, but be men posessing those honorable qualities that make the true royaneh. It shall be a serious wrong for anyone to lead a [Chief Statesmen] into trivial affairs, for the people must ever hold their Lords high in estimation out of respect to the honorable positions. (45-XLV, TLL).

Speaker of the Grand Council

Wampum 14. When the Council of the Five [Six] Nation [Chief Statesmen] shall convene they shall appoint a speaker for the day. He shall be a [Chief Statesman] of either the Mohawk, Onondaga or Seneca Nation.

Chief Statesmen of the Elder Brothers

Wampum 3. To you Adodarhoh, the Onondaga cousin [Chief Statesmen], I have entrusted the caretaking and the watching of the Five Nations Council Fire.

Trial of Impeachment

Wampum 19. If at any time it shall be manifest that a [Chief Statesman] has not in mind the welfare of the people or disobeys the rules of this Great Law, the men or the women of the Confederacy, or both jointly, shall come to the Council and upbraid the erring [Chief Statesman] has not in mind the welfare of the plaint of the people through the War Chief is not heeded the first time it shall be uttered again and then if no attention is given a third complaint and warning shall be given. If the [Chief Statesman] is still disobedient the matter shall go to the council of War Chiefs. (66 — LXVI, TLL)

And no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment on Conviction of Impeachment

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4. Election of Senators and Representatives -- Meetings of Congress

Election of Members of Congress

I. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

(See Amendment XX)

Congress to Meet Annually

2. The Congress shall assemble at least once in every year and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

(Changed to January 3d by Amendment XX)

Section 5. Powers and Duties of Each House of Congress

Sole Judge of Qualifications of Members

I. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and undersuch penalties as each House may provide.

Rules of Proceedings -- Punishment of Members

2. Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds, expel a member.

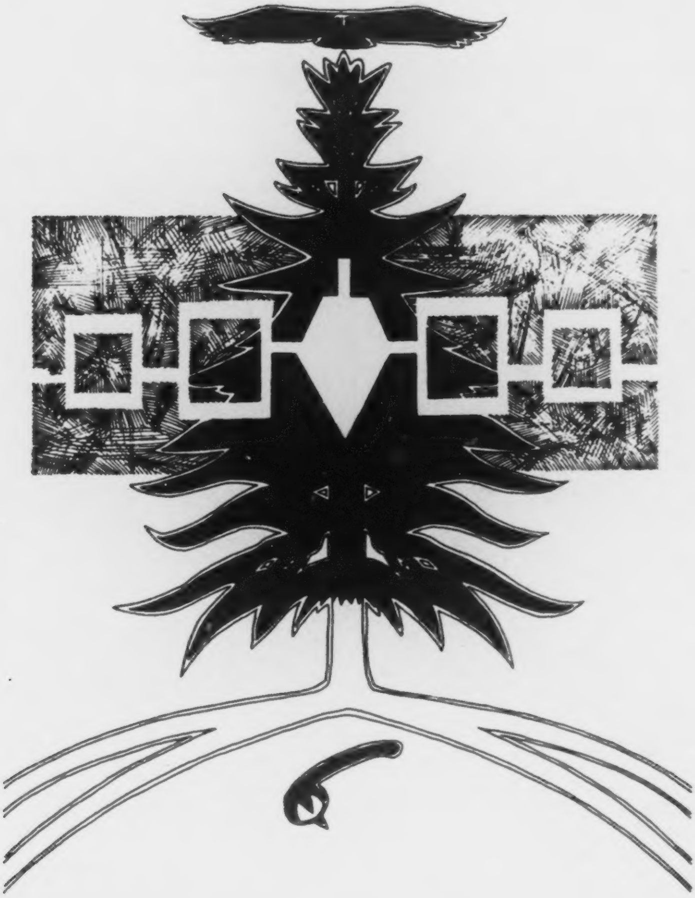
Journals

3. Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgement require secrecy; and the yeas and nays of the members of each House on any question shall, at the desire of one-fifth of those present, be entered on the Journal.

Adjournment

4. Neither House, during the session of Congress, shall without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6. Compensation,



The Tree of Peace symbolizes the Great Law hich "pierces the sky" for all nations to see. The ur white roots extend to the farthest parts of the arth; beneath the tree are buried all weapons of war while the eagle watches for approaching dangers. The Aionwatha wampum belt signifies the binding together of the five original Haudenausaunee nations.

Judgement on the Conviction of Impeachment

Wampum 19 (cont.). The War Chiefs shall then divest the erring [Chief Statesman] of his title by order of the women in whom the titleship is vested. When the [Chief Statesman] is deposed the women shall notify the Confederate [Chief Statesmen] through their War Chief, and the [Chief Statesmen] shall sanction the act. The women will then select another of their sons as a candidate and the [Chief Statesmen] shall elect him. Then shall the chosen one be installed by the Installation Ceremony. (123-XLI, EUC, Cf. 42-XLII).

When a [Chief Statesman] is to be deposed, his War Chief shall address him as follows:

"So you, __________, disregard and set at naught the warnings of your women relatives. So you fling the warning over your shoulder to cast them behind you.

"Behold the brightness of the Sun and in the brightness of the Sun's light I depose you of your title and remove the sacred emblem of the [Chief Statesmanship] title. I remove from your brow the deer's antlers to the women whose heritage they are."

The War Chief shall now address the women of the deposed Lord and say:

"Mothers, as I have now deposed your [Chief Statesman], I now return to you the emblem and the title of Chief Statesmanship], therefore repossess them."

Again addressing himself to the deposed [Chief Statesman] he shall say: "As I have now deposed and discharged you so you are now no longer [Chief Statesman]. You shall now go your way alone, the rest of the people of the Confederacy will not go with you, for we know not the kind of mind that possesses you. As the Creator has nothing to do with wrong so he will not come to rescue you from the precipice of destruction in which you have cast yourself.

You shall never be restored to the position which you once occupied."

Then shall the War Chief address himself to the [Chief Statesmen] of the Nation to which the deposed [Chief Statesman] belongs and say:

"Know you, my [Chief Statesmen], that I have taken the deer's antlers from the brow of __________, the emblem of his position and token of his greatness."

The [Chief Statesmen] of the Confederacy shall then have no other alternative than to sanction the discharge of the offending [Chief Statesman] (42-XLII, TLL).

Election of Elder and Younger Brothers — Meetings of the Grand Council

Election of Members of the Grand Council

Wampum 54. When a [Chief Statesmanship] title becomes vacant through death or other cause, the Royaneh women of the clan in which the title is hereditary shall hold a council and shall choose one among their sons to fill the office made vacant.

Such a candidate shall not be the father of any Confederate [Chief Statesman]. If the choice is unanimous the name is referred to the men relatives of the clan. If they should disapprove it shall be their duty to select a candidate from among their own number. If then the men and women are unable to decide which of the two candidates shall be named, then the matter shall be referred to the Confederate [Chief Statesmen] in the clan. They shall decide which candidate shall be named. If the men and the women agree to a candidate his name shall be referred to the sister clans for confirmation. If the sister clans confirm the choice, they shall refer their action to their Confederate [Chief Statesmen] who shall ratify the choice and present it to their cousin [Chief Statesmen] and if the cousin [Chief Statesmen] confirm the name then the candidate shall be installed by the proper ceremony for the conferring of [Chief Statesmanship] titles. (65-LXV, TLL).

Grand Council to Meet Whenever There is a Need

Wampum 3. When there is any business to be transacted and the Confederate Council is not in session, a messenger shall be dispatched either to Adodarho, Hononwirehtonh or Skanawatih, Fire Keepers, or to their War Chiefs with a full statement of the case desired to be considered.

Then shall Adodarhoh call his cousin (associate) [Chief Statesmen] together and consider whether or not the case is of sufficient importance to demand the attention of the Confederate Council. If so, Adodarhoh shall dispatch messengers to summon all the Confederate [Chief Statesmen] together to assemble beneath the Tree of the Long Leaves...(4-IV, TLL).

Powers and Duties of Each Nation of the Grand Council

Sole Judge of Qualifications of Members

Wampum 17. A bunch of a certain number of shell (wampum) strings each two spans in length shall be given to each of the female families in which the [Chief Statesmanship] titles are vested.

The right of bestowing the title shall be heredity in the family of females legally possessing the bunch of shell strings and the strings shall be the token that the females of the family have the proprietary right to the [Chief Statesmanship] title for all time to come, subject to certain restrictions hereinafter mentioned. (59-LIX, TLL).

Wampum 18. If any Confederate [Chief Statesman] neglects or refuses to attend the Confederate Council, the other [Chief Statesmen] of the Nation of which he is a member shall require their War Chief to request the female sponsors of the [Chief Statesman] so guilty of defection to demand his attendance of the Council. If he refuses, the women holding the title shall immediately select another candidate for the title.

No [Chief Statesman] shall be asked more than once to attend the Confederate Council. (30-XXX, TLL).

Rules of Proceedings — Punishment of Chief Statesmen

Wampum 52. The Royaneh women, heirs of the [Chief Statesmanship] titles, shall should it become necessary, correct and admonish the holders of their titles. Those only who attend the Council may do this and those who do not shall not object to what has been said nor strive to undo the action (63-LXIII, TLL).

Wampum Records

Wampum 23. Any [Chief Statesman] of the Five (Six) Nations Confederacy may construct shell strings (or wampum belts) of any size or length as pledges or records of matters of national or international importance.

When it is necessary to dispatch a shell string by a War Chief or other messenger as the token of a summons, the messenger shall recite the contents of the string to the party to whom it is sent. That party shall repeat the message and return the shell string and if there has been a summons he shall make ready for the journey.

Any of the people of the Five [Six] Nations may use shells (or wampum) as the record of a pledge, contract or an agreement entered into and the same shall be binding as soon as shell strings shall have been exchanged by both parties. (32-XXXII, TLL).

Footnote:
1. Family — Clan

For more information regarding the material in this pamphlet or to arrange for tree plantings in your area contact:

Tree of Peace Society
c/o Jake Swamp
Box 188-C
Cook Road
Mohawk Nation
via Akwesasne, N.Y. 13655

Information regarding the Morgan Papers can be obtained by writing to:

Greg Schaaf
44626 S.E. 151 Place
North Bend, WA 98045

This pamphlet was produced through the TREE OF PEACE SOCIETY, an organization dedicated to the securing of world peace through the sharing of Tree of Peace plantings by which we are able to share our ancient history. Already many 'trees for peace' have been planted. The State of California recognized these peace efforts by issuing a legislative resolution supporting this activity. The trees for peace plantings will continue until such time as we are able to secure a peaceful global world. The tree of peace planting ceremony addresses the need for disarmament, and also to bring awareness about the effects of environmental damage to all people.

Send tax deductible Donations TREE OF PEACE SOCIETY to the, Viola White Water Foundation, 4225 Concord St., Harrisburg, PA 17109.

SELECTED FACTUAL DATA

COMPILED BY PROFESSOR DONALD A. GRINDE (11/21/87)

ON:

Iroquois (Six Nations) Political Theory and the U.S. Constitution

"I have been more in the way of learning the sentiments of the Six Nations than of any of the other tribes of Indians." George Washington to James Duane, September 7, 1783, Saul K. Padover, ed., The Washington Papers (1955), p. 352

A. SYMBOLOGY OF IROQUOIS IN AMERICAN HISTORY:

1. IROQUOIS GREAT TREE OF PEACE (symbol of Iroquois government and constitution)
2. ONE ARROW - BUNDLE OF ARROWS (image of strength & unity)
3. THE IROQUOIS COVENANT CHAIN (extending the Tree of Peace to new areas)
4. GRAND COUNCIL FIRE (symbol of Iroquois government in session)

B. EXAMPLES OF INDIAN AND WHITE AWARENESS OF IMPACT OF IROQUOIS IDEAS ON THE U. S. CONSTITUTION

"We, the Indian people, may be the only citizens of this nation who really understand your form of government, and respect that form of government, as this form of government was copied from the Iroquois Confederacy."

"Native Women Send Message," Wassaja, IV, 8 (August, 1976), p. 7.

[At Albany, New York, Benjamin Franklin] "...proposed a plan for the union of the colonies and he found his materials in the great confederacy of the Iroquois. ... Here indeed was an example worthy of copying."

Julian P. Boyd, "Dr. Franklin: Friend of the Indians," in Roy N. Lokken, ed., Meet Dr. Franklin (1981), pp. 239 & 246. (Professor Boyd was editor of the Thomas Jefferson Papers and by all standards an eminent American Historian)

C. EXAMPLES OF USE OF SYMBOLOGY IN AMERICAN HISTORY

[The Advise of the Iroquois on unity in 1744 sank] "...deep into [AMERICAN] hearts, the advise was good, it was kind. They said to one another, the Six Nations are a wise people, let us hearken to their council and teach our children to follow it. Our old men have done so. They have frequently taken a single arrow and said, children, see how easy it is broken, the they have tied twelve together with strong cords--And our strongest men could not break them--See said they---this is what the Six Nations mean. Divided a single man may destroy you--United, you are a match for the world."

[The American people have] "...lighted a Great Council Fire at Philadelphia and ... we desire to sit under the same Tree of Peace with you ... And has God has put it into our hearts to love the Six Nations and their allies we now make the chain of friendship so that nothing ... can ... break it."

[The Continental Congress desires that] "... this our good talk remain at Onondago your Central Council House. That you may hand down to the latest posterity these testimonials of the brotherly sentiments of the twelve United Colonies towards their brethren of the Six Nations and their allies." (At this conference, the Americans invited the Iroquois to come to Philadelphia; the Iroquois stated this "...shall be done.")

"Proceedings of the Commissioners Appointed By the Contiental Congress to Negotiate a Treaty with the Six Nations, 1775," Papers of the Continental Congress, 1774-1789, National Archives (M247, Roll 144, Item No. 134).

In May and June of 1776, the Iroquois arrived in Philadelphia to meet with the Continental Congress. On June 11 (shortly after the Independence resolution was introduced and a revised plan of the Franklin's Albany Plan of Union was introduced as a model for the government), the Iroquois chiefs were ushered into Independence Hall. A speech was delivered to the Iroquois calling them "Brothers..." and declaring that the American people and the Iroquois be "...as one people, and have but one heart." At the conclusion of this speech, an Onondaga chief rose and asked that the President of the Continental Congress (John Hancock) be given and Indian name. The Congress graciously consented and the chief gave the "...president the name of Karanduawn, or the Great Tree..."

Worthington C. Ford, ed., *Journals Of the Continental Congress*, V, p. 430.

"Indians know the striking benefits of confederation; they have an example of it in the union of the Six Nations. The idea of the union of the colonies struck them forcibly last year."

"Notes on Debates of the Continental Congress, by John Adams, July 26, 1776, - Confederation," Worthington C. Ford, ed., *Journals of the Continental Congress*, VI, p. 1078.

"We ... bid you welcome to our great council fire. ... We inform you that we wish to sit down with you under the same tree of peace; to water its roots and cherish its growth, so that it may shelter us and you, and our and your children."

"Speech in Congress delivered to Six Nations, Delawares and Shawanese, December 7, 1776," Ford, ed., *Journals of the Continental Congress*, VI, p. 1011.

"And it is further agreed .. should it .. be found conducive for ... both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have representation in Congress ..."

Treaty with the Delawares of September 17, 1778, 7 Stat. 13.

Benjamin Franklin, as Minister to France, "...loved to cite and to practice faithfully the proverb of his friends, the American Indians, 'Keep the chain of friendship bright and shining.'" Franklin would also discuss the politics of the Indians with great exactness and interest, and he thought the ways of the American Indians more conducive to the good life than the ways of "...civilized nations."

Pierre Jean George Cabanis, *Oevres Posthumes de Cabanis* (1825), V, pp. 256, 246-247.

In 1777, the Continental Congress printed a pamphlet entitled: *Apocalypse de Chiokoyhekoy, Chefs des Iroquois.* Written and published in France, the pamphlet details an ancient Iroquois prophecy that tells of the coming of the white man and his struggle to free himself from the control of the mother country while learning the ways of Indians. The victory of the Americans is supposed to "...be a great victory for humanity."

Apocalypse de Chiokoyhekoy, Chefs des Iroquois... (1777) in Library of Congress.

[During the Constitutional Convention, Franklin used Iroquois terminology in describing the American government in writing the following words:] "I am sorry that the Great Council Fire of our Nation is not now burning, so that you cannot do your business there. In a few months, the coals will be rak'd out of the ashes and will be rekindled."

Benjamin Franklin to Cornstalk, the Cherokee Chief, June 30, 1787, Benjamin Franklin Papers, Manuscript Division, Library of Congress.

On July 27, 1787, John Rutledge, co-author of the first draft of the Constitution, raises questions at the draft committee meeting on sources of sovereignty in the people and cites the Iroquois example. James Wilson of Pennsylvania, another committee member, concurs with Rutledge's use of Iroquois ideas.

Richard. M. Barry, Mr. Rutledge of South Carolina (1942), p. 108 and 338, and "Propositions, Objections &c in Debates on the Adoption of the Constitution," James Wilson Papers, Vol 2., pp. 61-68 in Manuscript Division, Historical Society of Pennsylvania.

William Livington, Constitutional Convention delegate from New Jersey and father-in-law to John Jay spent a year among the Mohawks at the age of 14.

Dumas Malone, ed., Dictionary of American Biography (1933), XI, p. 325.

In August of 1787 while the first draft of the Constitution was being formulated, a Philadelphia publication printed this admonition:

"Unanimity recommended to Americans - A Fable - Addressed to the Federal Constitution

A careful father, of old, who found
Death coming, call'd his sons around.
They heard with reverence what he spake.
Here, try this bunch of sticks to break.

They took the bundle: ev'ry swain
Endeavour'd but the task was vain.
'Observe,' the dying father cry'd;
And took the sticks himself and try'd;

When separated, lo! how quick
He breaks asunder ev'ry stick
'Learn my dear boys, by this example,
So strong, so pertinent, so ample,

That UNION saves us all from ruin,
But to divide is your undoing:

For if you take them one by one,
See, with what ease the task is done!
Singly, how quickly broke in twain,
How firm the aggregate Thirteen!'

Is not the tale, Columbians, clear?
What application needs there here?
This motto to your hearts apply,
Ye Senators, - UNITE, OR DIE."

The American Museum: Or Repository of Ancient and Modern Fugitive Pieces, &c Prose and Poetical, II (August, 1787), p. 201 (Copy in the American Philosophical Society, Philadelphia, PA)

[In November of 1787 at the Pennsylvania Ratification Convention, James Wilson (one of the co-authors of the first draft of the Constitution) explained that "...the most important obstacle to the proceedings of the Federal Convention..." was in drawing the "...line between the national and the individual governments of the states." However, Wilson stated that the sentiments of the convention and of the people of America was "...expressed in the motto some of them..." have adopted "...UNITE OR DIE."

Max Farrand, ed., Records of the Federal Convention of 1787, III, p. 551.

Wilson also explained territorial expansion in the language of the Iroquois Covenant Chain. He stated that in order to gain the respect of Western settlers, new government officers should be "...chosen by the people to fill the places of greatest trust and importance in the country; and by this means, a Chain of Communication and confidence will be formed between the United States and the new settlements.

To preserve and strengthen this chain it will, I apprehend, be expedient for Congress to appoint a minister for the new settlements and Indian Affairs."

"Heads of a New Plan concerning the new states," James Wilson Papers, Vol 2, p. 132 in Historical Society of Pennsylvania, Manuscript Division

D. HISTORICAL RECOGNITION BY POLITICAL FIGURES

"The six nations were confederated in a ... republic upon the unique plan afterward adopted by our states and our national republic."

Eliot Danforth, Former New York State Treasurer, "Indians of New York," Utica Morning Herald, May 9, 1894.

"...it is out of a rich Indian democratic tradition that the distinctive political ideals of American life emerged. Universal suffrage for women as for men, the pattern of states that we call federalism, the habit of treating chiefs as servants of the people instead of their masters, the insistence that the community must respect the diversity of men and the diversity of their dreams--all these things were part of the American way of life before Columbus landed."

Felix Cohen, Associate Solicitor, Interior Department, "Americanizing the White Man," The American Scholar, XXI, 2 (Spring, 1952), pp. 179-180.

PREPARED STATEMENT OF ARLINDA LOCKLEAR, ESQ.

INDIAN TRIBES AND THE UNITED STATES: THE HISTORIC RELATIONSHIP *

It is a fundamental precept of federal Indian law that a government to government relationship exists between Indian tribes and the United States. Nearly four hundred treaties between those governments and an entire title of the United States Code are premised on this relationship. Morton v. Mancari, 417 U.S. 535, 552 (1974). The federal Indian policy of this and past administrations also attest to the political relationship between the United States and tribal governments. 1/

This relationship is similar to that between the United States and foreign nations. See Washington v. Fishing Vessel Assn., 443 U.S. 658, 675 (1979). Indeed, tribes who participate in this

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* As part of their commemoration of the Constitution's Bicentennial, the Alliance of Tribal Leaders and the Indian Rights Association requested the Native American Rights Fund to produce a study on the nature of the relationship between Indian tribes and the United States contemplated by the Constitution. This paper is that study. It was researched and written by Arlinda Locklear, staff attorney with the Native American Rights Fund, and summarized by her in testimony in support of S.Con.Res. 76 on Dec. 2, 1987, before the Senate Select Committee on Indian Affairs.

1/ In his Indian Policy Statement of Jan. 24, 1983, President Reagan observed, "throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold." See also Indian Policy Statement of President Nixon, July 8, 1970.

relationship are commonly known as recognized or acknowledged, much as foreign nations may be recognized by the United States. [2] Even those court decisions that are inimical to Indian interests recognize that the federal/tribal relationship is a political one similar to that between the United States and foreign nations. [3]

The United States Constitution is often cited as the source for the government to government relationship between tribes and the United States. See F. Cohen, Handbook of Federal Indian Law 89-98 (1942 ed.). In fact, the relationship predates the Constitution. Tribal governments existed for centuries before the arrival of Europeans on this continent, and since first contact have engaged in war, commerce and other activities with non-Indian governments. Thus, the relationship is rooted in international law and practical necessities. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558 (1832).

However, the Constitution does confirm the government to government relationship between Indian tribes and the United

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[2] Just as a foreign nation may exist without recognition by th United States, so may an Indian tribe. However, believing that federal legislation requires a government to government relationship with all tribes that exist and desire such a relationship, the Department of the Interior has promulgated regulations governing the determination of tribal existence and hence ability to participate in the federal relationship. See 25 C.F.R. Part 84.

[3] See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) and Cherokee Tobacco v. United States, 78 U.S. 616 (1871), where the Court upheld federal legislation restricting Indian rights by reference to principles of international law governing the United States' relationship with foreign nations.

States. Congress' power under the Indian Commerce Clause, for example, is restricted to self-governing Indian communities that can and do sustain a political relationship with the United States. See United States v. Sandoval, 231 U.S. 28, 46 (1913). Thus, legislation dealing separately and especially with Indians is acceptable as drawing political classifications rather than racial ones. Morton v. Mancari, 417 U.S. 535, 554 (1974).

The fact that Indian tribes and the United States have a political relationship reveals very little about the precise nature of it. [4] Certainly, the Constitution does not prescribe its terms. Thus, to understand the nature of the federal/tribal relationship confirmed by the Constitution, one must examine the intent of the framers and the relationship as it existed at that time. [5]

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[4] Some limitations on how Congress interacts with tribes are suggested by the requirement that the relationship be a political one. Presumably, Congress could not, as an exercise of its Indian Commerce Clause power, so undermine tribal self-governance that it effectively destroys tribes as separate governments, thereby abolishing the premise for the federal/tribal relationship. Courts have not used the notion that the Indian Commerce Clause preserves inviolate the essential self-governing character of Indian tribes as a limitation on Congress' authority in Indian affairs. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), where the Court considered limitations imposed on tribal governments in the Indian Civil Rights Act, 25 U.S.C. sec. 1301-1303; Gritts v. Fisher, 224 U.S. 640 (1912), and Wallace v. Adams, 204 U.S. 415 (1907), where the Court upheld acts of Congress imposing membership criteria on particular tribes for certain purposes. However, these cases dealt with relatively narrow proscriptions that arguably did not affect the essence of tribal self-government.

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[5] This is not to say that the Constitution requires that the present day federal/tribal relationship track that of the eighteenth century. There have been too many twists and turns in the relationship since the Constitutional Convention to credibly maintain now that the relationship is a static one. See Handbook of Federal Indian Law 47-180 (1982 ed.). But when the prevailing federal Indian policy expressly confirms the historic government to government relationship as it does in this Administration, the historic record is helpful in determining specifics of the relationship.

The Constitutional Convention and Indian Tribes

Although convened in 1787 for the purpose of improving upon the Articles of Confederation, the Constitutional Convention quickly embarked on the formation of a wholly new government. This was accomplished by the early presentation and consideration of the Virginia Plan. On May 29, 1987, Governor Edmund Randolph presented the Virginia Plan, which was drafted largely by James Madison and envisioned a considerably strengthened federal government. That same day, Charles Pinckney of South Carolina submitted a draft for consideration as did William Paterson of New Jersey. For two weeks afterwards, the Convention debated the Virginia Plan as a committee of the whole and then proceeded to discuss the New Jersey Plan in the same manner. The Pinckney Plan, which had been referred to the committee of the whole with the other two drafts, was never discussed by the Convention as a body, but on July 24 was referred to the Committee of Detail. *See generally* M. Farrand, *The Framing of the Constitution of the United States*, Yale U. Press (1913).

The Virginia Plan, which is commonly viewed as the first draft of the present Constitution, contained no reference to Indian tribes. As a result, the first two weeks' debate included no discussion of Indian affairs. The New Jersey Plan, considered next by the Convention, contained a single reference to Indians not taxed in a provision respecting requisitions. *See* Article III, Appendix III, Farrand, *The Framing of the Constitution of the United States*.

This provision occasioned the first mention of Indian affairs at the Convention. On June 11, James Wilson moved that the exclusion for Indians not taxed be added to the provision on apportionment as well as that for requisitions. M. Farrand, I The Records of the Federal Convention 201, Yale U. Press (1937). [6]

The apportionment issue was debated at length by the Convention. But in all proposed formulations, Indians not taxed were excluded. This phrase was not new to the members of the Constitutional Convention. It was first used by the Continental Congress in amending the Articles of Confederation on apportioning expenses among the states. See XXIV Journals of Continental Congress (hereinafter J.C.C.) 173-74, April 18, 1783. The Constitutional Convention adopted this formulation as a fair one, since it had been agreed to earlier by eleven of the thirteen states. I Records of the Federal Convention 201. The Continental Congress had adopted this formulation because it believed that individual Indians were citizens of their own governments and hence not subject to state or federal authority. In other words, the Continental Congress viewed Indians living in tribal relations as foreign nationals. See discussion below, pp. 10-11. The use of the same formulation by the Constitutional Convention presumably reflected the same view of Indians.

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[6] The apportionment issue refers to the question of how representation in the two houses of Congress was to be apportioned among the states. The requisitions issue refers to the question of how taxes were to be apportioned among the states. Both were resolved with the same formula that appears in Art. I, sec. 2, cl. 3 of the Constitution.

The New Jersey Plan prompted other mention of Indian affairs. That plan called for a considerably weaker federal government than the Virginia Plan, a difference that troubled Madison. On June 19, Madison inquired about the New Jersey Plan: "Will it prevent encroachments on federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic ancient and modern. By the federal articles, transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties and wars with them." I Records of the Federal Convention 316; see also J. Madison, "Vices of the Political System of the United States," (April 1787), 9 Papers of James Madison 348. This statement by Madison reflected a belief that the conduct of Indian affairs properly belonged to Congress and that relations with tribes consisted of the usual business of nations -- i.e., treaty-making and war. 7/.

7/ This statement also suggests that the treaty clauses of the Constitution (Art. I, sec. 10 and Art. II, sec. 2) and the Supremacy clause (Art. VI, sec. 2) comprehended Indian treaties. These provisions gave the federal government exclusive authority to enter into treaties and made treaties supreme to state law. Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979); Antoine v. United States, 420 U.S. 194 (1975). Again, the comparability of Indian relations to those with foreign nations is plain.

At the conclusion of the debate on the Virginia and New Jersey plans, the Convention appointed a Committee on Detail to draft a constitution based upon the proceedings of the Convention to that point. Rutledge, Randolph, Gorham, Ellsworth and Wilson were appointed to the committee. The Convention had not discussed Indian relations generally, since neither the Virginia or New Jersey plan addressed the issue. However, as noted above, the Pinckney Plan was referred to the Committee on Detail, and it did contain a grant to Congress of the exclusive power among others "of regulating Indian affairs." III *Records of the Federal Convention* 607.

The Committee's first report to the Convention on August 6 enumerating Congress' powers did not refer to Indian affairs. I *Elliott's Debates on the Federal Convention* 223 (Phil. 1836). On August 18, Pinckney proposed that Congress be given other powers, including the power "To regulate affairs with the Indians, as well within as without the limits of the U.S." *Id.* at 247; I *Records of the Federal Convention* 324. Madison proposed that those additional powers be referred to the Committee. *Id.* James Wilson prepared the second draft of the Constitution for the committee, which was recommended to the Convention on August 22 and included the following addition to the commerce clause: "and with Indians, within the limits of any State, not subject to the laws thereof." II *Records of the Federal Convention* 367.

On August 31, the Convention referred the second draft to the Committee of Eleven to consider parts of the Constitution not yet acted upon. [8/] The Committee of Eleven simplified the language to read "and with Indian tribes" in the report to the Convention on September 4. The committee's recommendation was adopted by the Convention that day. IV *Elliott's Debates* 283; II *Records of the Federal Convention* 493. When the Committee on Style reported out the final draft to the Convention, it changed the semicolon that had preceded the Indian commerce clause into a comma. II *Records of the Federal Convention* 595. Thus, the simplified language became part of Congress' authority over interstate and foreign relations. All this took place with no substantive objection from any member of the Convention or any real discussion by the body.

If discussion of relations with Indian tribes took place, it occurred in committee. Wilson prepared a draft constitution with annotations for the committee but the only reference to Indian affairs there is a marginal note indicating that Indian affairs should be added to Congress' enumerated powers. II *Records of the Federal Convention* 143. [9/] Similarly, there is no record of

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[8/] The Committee of Eleven consisted of Gilmany, King, Sherman, Brearly, Norris, Dickinson, Carroll, Madison, Williamson, Butler and Baldwin. IV *Elliott's Debates* 280.

[9/] Wilson's first formulation of the Indian commerce clause was obviously influenced by Charles Pinckney. As Pinckney's biographers indicate, his contribution to the Constitution was substantial. *See*, *e.g.*, Bettea, *The Contribution of Charles Pinckney to the Formulation of the American Union* (1879); Bowen, *Charles Pinckney, A Forgotten Statesman* (1928). Unfortunately, neither the Pinckney biographers nor the Pinckney Papers contain discussion of the Indian Commerce Clause.

discussion in the Committee of Eleven that resulted in the simplified, final language of the Indian commerce clause. It is likely, though, that that committee adopted the simpler formulation to end the uncertainty caused by the less plain Indian clause in the Articles of Confederation. Art. IX, cl. 4 of that document delegated to the Congress the sole and exclusive power of "managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated." (IX J.C.C. 919). This grant of power was described by Madison as obscure and contradictory, see The Federalist No. 42, and occasioned considerable controversy during the confederation period. Apparently, the drafters sought to strengthen Congress' hand by improving upon the language of the Articles of Confederation. See The Framing of the Constitution, p. 128.

There was as little discussion of Indian affairs in the debates on the ratification of the Constitution as there had been at the Constitutional Convention. The few references made to relations with Indian tribes were generally incidental to a more general discussion. For example, the breadth of powers given Congress by the document was controversial and was defended by the necessity among others, of protecting the states against Indian depredations. See, e.g., Thomas McKean, speaking at the Pennsylvania Convention, II Records of the Federal Convention 286, 415. Only in the case of Georgia was relations with Indians mentioned on its own merits in the ratification debate. But the Georgians did not debate the meaning of the Indian Commerce Clause; they noted the desirability of a speedy ratification so that they could enlist the aid of Congress in their war against the Indians. Id. at 210-211. [10]

The absence of controversy or debate on Indian affairs during the drafting and ratification of the Constitution is a telling fact, but should not be interpreted as a lack of interest in the subject at the time. Rather, it indicates a general consensus on the subject of Indian affairs. As with foreign affairs, relations with Indian tribes were considered business properly conducted by Congress. The similarity perceived between relations with tribes and those with foreign nations is evident from the placement of the Indian Commerce Clause and the complaints respecting state violations of Indian treaties. And the provisions excluding individual Indians from the population count for purposes of apportionment and taxation show that Indians were viewed as subject only to their own civil authority. In other words, the consensus was that tribes were separate nations whose relations with the United States were determined by their own assessment of their national interests.

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[10] At the time, Georgia faced an iminent threat of war with the Creek Indians. See discussion below. So grave was the danger that George Washington observed of Georgia, "But, if a weak state, with powerful tribes of Indians in its rear and the Spaniards on its flank, do not incline to embrace a strong general government, there must, I should think, be either wickedness or insanity in their conduct." Id. at 221.

The Continental Congress and Indian Tribes

Approximately three-fourths of the delegates to the Constitutional Convention had previously served as members of the Continental Congress. Framing of the Constitution, p. 39. Because the Continental Congress had managed relations with Indian tribes since the United States' separation from Great Britain, those delegates had some level of experience in Indian affairs. Some of the most influential delegates had had considerable experience with Indian affairs while in Congress. Madison and Jefferson had as members of Congress played major roles in drafting the Indian clause in the Articles of Confederation. See, M. Jensen, The Articles of Confederation: An Interpretation of the Social, Constitutional History of the United States 155-59 (1940); V J.C.C. 1076-79. And Wilson and Pinckney had served on Congress' standing Indian committee. Presumably, these delegates formulated the Indian provisions of the Constitution in light of their experience in Congress. Thus, the Continental Congress' relationship with Indian tribes is strong evidence of what the draftsmen intended in confirming the political relationship with tribes.

In its dealings with Indian tribes, the Continental Congress largely adopted the British Crown's policy in substance and form. Britain had learned in the French and Indian War of 1754 that tribes were formidable players in the contest among nations on the North

American continent. Up to the outbreak of that war, Britain had often ignored tribes' interests, and as a consequence Indians adhered to the French. In 1755, Britain corrected this serious oversight by appointing two superintendents of Indian affairs - one for a northern department and a second for a southern department. The superintendents had full charge of the political relations between the British and the Indians and were directed to control trade with Indians and speculation in Indian lands, establish clear boundaries between tribal and colonists' lands, and above all else keep peace. See generally, Prucha, American Indian Policy in the Formative Years 5-25, U. of Nebraska Press (1970). "The superintendents were, in effect, ambassadors whose duties consisted of negotiating treaties, reporting to the home government, and keeping peace generally among Indian tribes and the border settlers." Handbook of Federal Indian Law, p. 57.

Aware of the British experience, the Continental Congress quickly took steps to secure the tribes' neutrality when war with Britain seemed certain. In July 1775, the Continental Congress resolved that "securing and preserving the friendship of the Indian Nations . . . [was] a subject of the utmost moment to these colonies." Congress assumed that Britain would "spare no pains to excite the several Nations of Indians to take up arms against these colonies; and that it becomes us to be very active and vigilant in exerting every prudent means to strengthen and confirm the friendly disposition towards these colonies . . . " Consequently, Congress established three Indian departments -- a northern, middle, and southern -- and appointed commissioners for each. The primary responsibility of the commissioners was to "preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions." II J.C.C. 174-177, July 12, 1775. This was the first expression of the dominant issue in United States/tribal relations until well after the ratification of the Constitution -- the maintenance of peace or conduct of war between the two. See discussion below.

From 1775 until the ratification of the Constitution, the Continental Congress was actively engaged in the conduct of Indian affairs. The importance Congress attached to Indian affairs is demonstrated by its appointment in 1776 of a standing Indian committee that oversaw the Indian commissioners (IV J.C.C. 317, April 29, 1776) and the instructions given them concerned trade, maintenance of peace and integrity of territorial boundaries -- the usual business of nations. 11/ The commissioners attempted to persuade the tribes to remain neutral in the war. That

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11/ When Congress addressed a particular concern or event involving one tribe, its statements also reflected the government to government relationship. For example, in 1776 Congress directed its northern commissioners to inquire about the murder of a non-Indian in Indian country. Once the offender was identified, the commissioners were to demand due punishment of his tribe, "which being granted, this Congress will not consider the same as a national act." Aug. 19, 1776, V J.C.C. 668.

failing, Congress authorized the commissioners to enlist tribes on the side of the colonists. Congress adopted substantive policies in the early years generally calculated to attach the tribes to the colonists' cause -- it directed the commissioners to closely regulate trade with Indians and implored the states to keep its citizens from settling on Indian land. See, e.g., IV J.C.C. 96, Jan. 27, 1776, on trade with Indians; IV J.C.C. 218, Mar. 20, 1776, on the issue of passports into Canada and Indian territory for the conduct of trade; VII J.C.C. 166, Feb. 27, 1777, and VIII J.C.C. 392, May 27, 1777, on protection of Indian lands. After the Revolutionary War, Congress ordered that terms of peace with the Indian nations be concluded. See XXV J.C.C. 680-694; XXVII J.C.C. 453-464. Congress also took further steps to prevent white encroachment on Indian land. See Proclamation of Sept. 22, 1783, XXIV J.C.C. 264. Congress' conciliatory approach to tribes was best reflected in the Northwest Ordinance of 1787:

> The utmost good faith shall always be observed toward the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship.

XXXII J.C.C. 66-69, July 13, 1787. See generally Prucha, pp. 26-40.

In all its dealings with tribes, the Continental Congress treated tribes as an equal, i.e. as independent sovereigns. The

Congress received visiting tribal delegations as it did foreign ones: defraying the tribal delegations' expenses, bestowing gifts on tribal dignitaries, and exchanging previously approved communications. See III J.C.C. 433; IV J.C.C. 267, 392; V J.C.C. 669-70; VI J.C.C. 1003; XIV J.C.C. 676. The communications contained language that bespoke equality between the communicants and dealt with matters of proper concern between nations. The following resolution respecting the Six Nations is typical:

> Resolved, That the deputies from the late hostile Tribes of the Six Nations now assembled at ________ be informed by the Commissioners for Indian affairs, that Congress are well pleased with their visit and accept it as a mark of their disposition to renew the friendship which subsisted so many ages between their ancestors and the citizens of these states.
>
> That Congress have resolved to take the earliest opportunity to enter into a treaty of friendship and commerce with the Six Nations and other Indians lately at War, and for that purpose will appoint Commissioners to meet their chief men at some proper place . . .

26 J.C.C. 71, Feb. 6, 1784. [12] Where a policy directly affected

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[12] The addresses made by Congress directly to visiting tribal delegations were similar to the resolution quoted above. The reference above to deputies was a use of diplomatic language indicating the national status of tribes. In speeches addressed directly to tribes, Congress used metaphors better understood by tribes, referring to them for example as brothers. This metaphor just as plainly showed that Congress deemed tribes to be their equals. See IV J.C.C. 269; [illegible].C.C. 786; VI J.C.C. 1010; IX J.C.C. 994.

tribes, Congress presumed to act only with the tribes' consent. See, e.g., IV J.C.C. 191, Mar. 8, 1776, where Congress authorized the use of Indians as soldiers in the American army where "the tribes to which they belong shall, in national council, held in the customary manner, have consented thereto . . . "; IV J.C.C. 268, April 10, 1776, where Congress directed that disputes arising between whites and Indians be determined by arbitrators, one being chosen by each of the parties, if the Indians consent; VIII J.C.C. 392, May 27, 1777, where Congress resolved that Pennsylvania either remove non-Indian settlers from tribal lands there or pay the tribe for the land, at the option of the Indians. 13/

Indeed, the Continental Congress explicitly acknowledged the independent status of tribes in the Articles of Confederation. In its earliest draft, the Articles of Confederation delegated to the Congress the power of "Regulating the Trade, and managing all Affairs with the Indians," leaving no Indians subject to state

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13/ Throughout this period, the administration of Indian policy rested with the Secretary of War. The Secretary personally supervised the work of Indian superintendents, there being no separate office in the department charged with Indian affairs. The Bureau of Indian Affairs was created by executive action in 1824 and the position of Commissioner of Indian Affairs established by legislation in 1832. See Prucha, American Indian Policy, pp. 51-65. Until 1824, then, relations between tribes and the United States were managed directly by a cabinet level officer.

authority. V J.C.C. 682. The Virginia delegates believed that those individual Indians who lived in the colonies and were subject to their laws should be excepted from Congress' power. V J.C.C. 1076-79. As a result of that discussion, the Indian clause was modified so that Congress' authority was restricted to Indians "not members of any of the States." See M. Jensen, pp. 155-158. That phrase was construed by contemporaries to grant to Congress authority over Indians "who do not live within the body of the Society, or whose persons or property form no objects of its laws." (I Writings of James Monroe 46-47), or over tribes who were considered "as independent nations," (F. Hough, Proceedings of the Commissioners of Indian Affairs 21-22, Albany (1861)). In other words, tribes were considered to be separate political bodies, so that only those individual Indians "who had lost their nationality" were subject to state jurisdiction. G.T. Curtis, History of the Origin, Formation, and Adoption of the Constitution of the United States 327 (1858); see also Oneida Indian Nation v. State of New York, 649 F.Supp. 420, 432 (N.D.N.Y. 1986).

Toward the end of the confederation period, the Continental Congress vigorously asserted its authority to manage relations with independent tribes. The United States had concluded treaties with the Cherokee and Creek Nations that established boundaries between them and the United States and assured the tribes of their lands. See Treaties of Hopewell, 7 Stat. 18, 21, and 24. Despite these treaties, North Carolinians and Georgians openly and aggressively claimed tribal lands, claiming the federal treaties to be invalid. In 1787, a committee of Congress reviewed the situation and found that independent Indian tribes were not subject to the civil authority of states. XXXIII J.C.C. 454-463, Aug. 3, 1787. Throughout the conflict with these states over Indian treaty violations, the Continental Congress acknowledged the independence of tribes. See XXXIV J.C.C. 476-79.

Perhaps the strongest evidence of the character of the relationship between the United States and tribes is found in treaties between the two. Of course, the very fact that business between tribes and the United States was conducted through treaties indicates that tribes were perceived as nations. As Chief Justice Marshall observed:

> The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their mark among those powers who are capable of making treaties . . . The words "treaty" and "Nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having a definite and well understood meaning. We have applied them to Indians, as we have applied them to other Nations on the earth. They are applied to all in the same sense.

Worcester v. Georgia, 31 U.S. at 559 (1832); see also Washington v. Fishing Vessel Ass'n., 443 U.S. at 675; Holden v. Joy, 84 U.S. 211, 242-44 (1872).

The terms of Indian treaties also reflected the sovereign status of tribes. The Treaty of Sept. 17, 1778, between the Delaware Nation and the United States, the earliest Indian treaty, contained provisions common in international treaties. In language that showed the parity of the contracting parties, it provided for an alliance between the two:

> That a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations, and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities, till their enemies are brought to reasonable terms of accomodation: and that if either of them shall discover any hostile designs forming against the other, they shall give the earliest notice thereof, that timeous measures may be taken to prevent their ill effect.

7 Stat. 13. The parties also made provisions for punishment of each other's citizens and for trade. Lastly, the parties agreed that other tribes might confederate with the Delaware, "to form a state whereof the Delaware Nation shall be the head, and have a representation in Congress:" Id., Article VI. Early treaties with other tribes also included mutual assistance pacts, (see, e.g., Treaty of Jan. 31, 1786, with the Shawnee, 7 Stat. 26, Art. III), provided for the mutual exchange of prisoners, (see, e.g., Treaty of Jan. 21, 1785 with the Wyandot, 7 Stat. 16, Art. I; Treaty of Nov. 28, 1785 with the Cherokee, 7 Stat. 18, Articles I and II), contained assurances of territorial integrity (see, e.g., Treaty of

Jan. 31, 1786 with the Shawnee, 7 Stat. 26, Article VI), and provided for the extradition of fugitives from justice (see, e.g., Treaty of Nov. 28, 1785 with the Cherokee, 7 Stat. 18, Articles VI and VII). [14/]

The variety and number of treaties and other engagements between Indian tribes and the United States show that no model federal/tribal relationship prevailed. In each instance, the parties dealt with recurring issues, such as war and peace, commerce, and jurisdiction over each other's nationals. However, the resolution of these issues and hence the particulars of the relationship varied from one tribe to the other. Thus, the most striking feature of all the federal/tribal relationships at the time was their bilateral quality, i.e. each was worked out separately by the two parties in an exercise of their free will.

[14/] These treaties usually contained an acknowledgment of United States' protection for the tribe, but this provision was not inconsistent with the tribes' sovereign status:

> The Indians perceived in this protection only what was beneficial to themselves - an engagement to punish aggressions on them. It involved practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British Crown as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

Worcester v. Georgia at 552.

Indian Relations in 1787: The Reality

As described above, the United States and Indian tribes related as equals in 1787. The United States did not relate to tribes in that manner out of magnanimity, however, but out of necessity. At that time, Indian tribes were not only capable of waging war against the United States, but posed a grave threat because of potential alliances among tribes, with Great Britain, or with Spain. [15/] These circumstances obliged Congress to adopt a conciliatory policy toward tribes that was respectful of tribes' independence.

At the end of the Revolutionary War, the Continental Congress attempted to normalize relations with its tribal enemies and allies through treaties. See generally Prucha, American Indian Policy, pp. 31-34. Its efforts did not succeed. The hostile Iroquois tribes

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[15/] The power to make war, of course, is a fundamental attribute of sovereignty in international law. As Felix Cohen correctly observed, the power in Indian tribes to make war has been recognized until relatively recent times. Handbook of Federal Indian Law 274 (1942 ed.). However, the later hostilities between tribes and the United States were confined largely to the frontier. Two factors distinguished the early constitutional period in this regard - first, that hostilities with tribes were caught up with foreign relations because of potential alliances with foreign nations, and second, that had such an alliance come about tribes and their allies would have threatened the entire United States.

in the north resented the treaty terms of the Treaty of Ft. Stanwix. The hostile tribes in the south resented the increasingly aggressive violations of their territory by non-Indian settlers. And the western tribes in the Ohio Valley were made restless by the pretentions over their domain asserted by the newly independent United States. Great Britain encouraged these tribal resentments in the north and west as Spain did in the south. As a result, the United States feared an Indian war that, if alliances were formed, would have been disastrous.

The problem with the north and northwestern tribes [16/] began with the 1783 Treaty of Paris between Britain and the United States. The boundary agreed upon in this treaty gave the United States the Northwest Territory, which bordered on Canada and was claimed as hunting grounds by hostile northwest tribes. The

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[16/] It must be remembered that the frontier in the late eighteenth century was very close to non-Indian population centers on the east coast. The hostile northern tribes, members of the Six Nations Confederacy, were located in what is today central New York State. The hostile northwest tribes were located in the Ohio Valley, on what is today Ohio, Indiana and Kentucky. And along the frontier itself in the north, the tribal and non-Indian populations were roughly the same in 1790. Thus, the threat posed by hostile tribes in the north at the time was great and immediate. See Report of Dr. Jack Campisi, Oneida Indian Nation v. State of New York, 79-CV-798, 78-CV-184 (N.D.N.Y.)

territory also contained several English military forts that Britain refused to vacate. At the Indian treaties of Fort McIntosh, Fort Finney and Fort Stanwix, the United States asserted sovereignty over the tribes' territory in the northwest and exacted a cession of part of it from them as recompense for their part in the war. The tribes refused to accept the new boundary and, when the disputed area was flooded with American settlers, hostilities resulted. F.P. Prucha, *The Great Father, The United States Government and the American Indians* 62 *et seq.*, U. of Nebraska Press (1984).

The British supported the tribes' grievances. They suggested to the tribes that they might receive military support from the British forts remaining in the territory and they provided ammunition and supplies to the tribes. In fact, the tribes received assistance from the British that "was little short of the aid given ordinarily to an open ally." J.S. Basset, *The Federalist System 1789-1901*, at 62, Cooper Square Publishers, Inc. (1968). The Mohawk leader Brant sought to capitalize on British support by attempting to organize all the tribes in the northwest to stand together in defense of their hunting lands. *Id.* at 64. The British went so far as to suggest to the tribes that through a British/tribal alliance a separate Indian Nation consisting of the confederated tribes might be created in the northwest as a neutral, buffer state between the United States and British Canada. *Id.*

Brant played a key role in bringing together the tribes and Britain for war against the United States. He met openly with the western tribes to discuss confederating against the United States and journeyed to Britain twice for that purpose. His second trip in December 1785 was described by the London press as follows:

> Monday last, Colonel Joseph Brant, the celebrated King of the Mohawks, arrived in this city from America . . . This extraordinary personage is said to have presided at the late grand Congress of confederate chiefs of the Indian nations in America, and to be by them appointed to the conduct and chief command in the war which they now meditate against the United States of America. He took his departure for England immediately as that assembly broke up; and it is conjectured that his embassy to the British Court is of great importance.

D. Van Avery, Arc of Empire, The American Frontier 1784-1803, at 52, Wm. Morrow & Co. (1963). Upon his return, Brant met again with the western tribes at Hurontown. That conference produced an address to Congress dated December 18, 1786, signed by eleven Indian nations. The address proposed that the United States and the Indian nations treat for peace, but bluntly warned that "If fresh ruptures ensue, we . . . shall most assuredly, with our united force, be obliged to defend those rights and privileges which have been transmitted to us by our ancestors." Id. at 58. In fact, the hostilities between those tribes and the United States had never ceased, as Indian raids increased swiftly along with white settlers' incursions onto Indian land. Id. at 56.

Serious problems with tribes in the south also began to develop shortly after the close of the Revolutionary War. On June 1, 1784, Spain concluded a treaty with the Creek Nation, the most numerous of all Indian nations, promising them arms and supplies in support of their resistance to American encroachment. Arc of Empire, p. 16. Spain was in possession of the Floridas and Louisiana; she sought to control the trade of the southern tribes and use them through alliances with them as a barrier against advancing American settlers.

As in the northwest, American encroachments onto southern tribes' territories provoked Indian attacks, but the federal government refused military support for the whites. The United States had already committed its meager military resources to defense of the northwest against tribes and was not capable of defending the south simultaneously. In addition, the United States could ill afford to antagonize Spain by attacking Spain's Indian allies while delicate negotiations were underway over the United States' southern boundary and navigation of the Mississippi. The Great Father, p. 67. [17/] At all costs, the United States had to avoid war in the south against a tribal/Spanish alliance at the same time it sought to break the incipient tribal/British alliance in the northwest.

[17/] The conditions of the old northwest and southwest have been the subject of several histories. See The Great Father, p. 63 n.7 and p. 67 n.18, respectively.

Thus, when the Constitutional Convention convened in 1787, relations with Indian tribes and their would-be European allies were at their worst. War seemed certain, and the Americans reasonably feared for their national security. By virtue of necessity, American leaders of the day dealt with tribes in their national capacity. Those same leaders as delegates to the Constitutional Convention would have contemplated a continuation of the same quality of relationship, if not the same state of affairs, between tribes and the United States.

Of course, this state of affairs did change, albeit not quickly. The United States launched its first offensive against the Indians in the Northwest in September 1790. The expedition, led by General Josiah Harmar, was routed by the tribes. A second expedition, led by General St. Clair in November 1791, was an even greater disaster. Of the 1400 troops led by St. Clair, 1350 were either killed or wounded. The defeat was a national disaster, resulting in a formal investigation and the resignation of St. Clair. President Washington was much alarmed, particularly in light of the rapidly deteriorating relations with Britain. The Federalist System, p. 64. Finally, fortunes changed in 1794 at the Battle of Fallen Timbers. General Wayne engaged the western tribes on the Maumee River less than five miles from a British fort. When American victory became plain, the Indians sought refuge at the British fort, but were denied admission. Thus ended the tribal/British alliance that the Americans had feared since 1783. Within six months, every belligerent western nation had opened negotiations for peace with the Americans. The Arc of Empire, pp. 323-330. And with American troops free to attend to the south if necessary, peace was restored with the southern tribes. The Great Father, p. 69. Not until 1795 was the United States' relationship with tribes determined by something other than a state of war.

Conclusion

The Constitution confirms a relationship between Indian tribes and the United States that existed at the time of the writing of that document. As history shows, that relationship was a bilateral one between equals. The participants respected each other's territory, civil authority over their own citizens, and free will. The participants levied war against each other, concluded peace, contracted alliances and engaged in trade with each other. These are acts of nationhood that show the United States' and tribes' mutual appreciation of their status. And as nations, each Indian tribe and the United States determined the specific terms of their relationship in light of the circumstances and their perceived self-interest. Having experienced this kind of relationship with Indian tribes, the Founding Fathers provided for its continuation under the Constitution.

Quinault Indian Nation

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TESTIMONY OF JOSEPH B. DELACRUZ,
CHAIRMAN, QUINAULT INDIAN NATION
BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
HEARING ON SENATE CONCURRENT RESOLUTION 76
DECEMBER 2, 1987

I appreciate the privilege and honor to testify today before the Senate Select Committee on Indian Affairs on Senate Concurrent Resolution 76 which acknowledges the contribution of the Iroqois Confederacy of Nations to the development of the United States Constitution and reaffirms the continuing government-to-government relationship between Indian Tribes and the United States established in the Constitution. I certainly hope this Congressional resolution will serve to educate the American public as to American Indian Tribal sovereignty as embodied in the U.S. Constitution and create meaningful improvements in the relationship between American Indian Tribes and the United States.

I recently participated in a forum hosted by the Alliance of American Indian Leaders and the Indian Rights Association in Philadelphia, in commemoration of the bicentennial of the Constitution to explore the topic: "In Search of 'A More Perfect Union': American Indian Tribes and the United States Constitution." It was an enlightening and saddening experience to refresh my knowledge of the United States and American Indian Tribes at the time of the Constitution and the historic relationship established between sovereign nations. American Indian people have suffered, endured, and survived over the last 200 years despite the assurances of the Constitution, the Northwest Ordinance of 1787, and solemn agreements between leaders of nations.

I quote an appropriate statement by a presenter at the Philadelphia forum, Milner S. Ball, in the introduction to his fascinating American Bar Foundation Research Journal presentation: Constitution, Court, Indian Tribes. He states:

> We claim that the "constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land." But we also claim to recognize the sovereignty of Native American nations, the original occupants of the land. These claims-one to jurisdictional monopoly, the other to jurisdictional multiplicity-are irreconcilable. Two hundred years have produced no resolution of the contradiction except at the expense of the tribes and the loss to non-Indians of the Indians' gift of their difference.

American Indian Tribal governments are unique to the Federal system by virtue of their treaty-trust relationship with the United States. Unfortunately, the historical evolution of the United States-Tribal relationship has allowed a dominating Federal bureaucracy to permeate and control most aspects of Tribal government operations.

American Public Needs To Be Educated About American Indian Treaties, Governments, and Cultures

The Congress, Federal bureaucrats, and the general American public have minimum common knowledge about American Indian Tribal governments, their distinct cultural heritages, their sovereign status as dependent nations, their contributions to society, the meaning of their treaties, and their clear legal right to existence in modern society. Generally, we are understood in the context of Hollywood and the brief historical anecdotes included in High School American history textbooks.

This limited public knowledge creates obvious opportunities for political mischief and negative racism. In the Congress, we are constantly involved in the education process whether promoting positive policies or opposing negative legislation in Indian Affairs. With the Federal bureaucracy, we daily confront policies, regulations, and program requirements promulgated for the general system of governments, but which negatively impact our sovereign Tribal status. And, the general public is most susceptible to an ever-present network of anti-Indian hate groups fed by greed and racism whose public agenda is to destroy Tribal treaty rights and steal Tribal resources. As Tribal governments have more assertively protected their rights and resources in Congress and the courts in recent years, these anti-Indian organizations have grown proportionately spreading negative misinformation. Sadly, there continues to be politicians at all levels most willing to capitalize on these negative elements within their constituencies.

I am heartened in my travels to experience general public interest and support for American Indian people when they are informed on the issues. In Washington State many misunderstandings have been resolved and a spirit of mutual respect and cooperation is prevailing due to a process of public dialogue and education. I believe Senate Concurrent Resolution 76 should serve as the cornerstone to fully inform the American public through research, media, and public forums as to our rightful place in history and in the modern world.

A Government-to-Government Policy Should Promote Tribal Self-Government and Tribal Self-Sufficiency

The difference between stated public policy and its actual implementation is an excellent measure of misunderstandings and misconceptions. This is certainly true for the United States Congress and Administrations in American Indian Affairs. President Reagan in his White House Indian Policy Statement of January, 1983 spoke eloquently of his support for government-to-government relations with Indian Tribes. Just last week Presidential proclamation 5745 of November 19, 1987, proclaimed November 22-28, 1987, as "American Indian Week." In his proclamation, President Reagan stated:

> The Constitution affirmed the special relationship of the Federal government with American Indians when it stipulated: "the Congress shall have Power To...regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes;..." This unique government-to-government relationship continues today and has been reinforced through treaties, laws and court decisions. During the Bicentennial of the Constitution, it is especially fitting that we recognize and celebrate the many contributions of American Indians.

I certainly agree with this policy statement in principle, but certainly not in its current practice.

The current administrations of the Bureau of Indian Affairs and Indian Health Service have been consistently criticized by American Indian leadership for their unwillingness to meaningfully consult on planned policies and programs. Poorly conceived policies are created behind closed doors and then promoted with Congress. We have been forced to constantly stop or alter these negative polices with Congress. But this is the "government-to-government" relationship which evolved historically and remains entrenched in practice to protect bureaucratic self-interest.

Since the enactment of the Indian Reorganization Act of 1934, United States policy has attempted to promote social and economic self-sufficiency in Indian Nations. How the U.S. government carries out this policy has remained an issue of contention. This is due, in part, to the widely divergent views of U.S. administrators and legislators over what the outcome of this policy should be. To some, self-sufficiency means the perpetual social, economic and political existence of Indian Nations exercising the full powers of self-governance. To others, self-sufficiency means the elevation of social and economic standards on Indian Reservations equal to neighboring, non-Indian communities; and, the ultimate elimination of Indian Nations through assimilation.

Self-sufficiency among Indian peoples means that Indian Nations are able to govern their country and peoples without external interference; Indian peoples can renew their natural creative abilities to feed themselves, house themselves, and clothe themselves, relying on their own labor and natural resources; Indian peoples can freely decide how to best serve their social and health needs; and, as self-sufficient societies Indian Nations expect the United States of America to uphold its agreements and treaties to "preserve, protect and guarantee the rights and property" of Indian Nations against encroachments and fraud. Clearly, Indian Nations believe self-sufficiency must lead to their perpetual existence as distinct social, economic, and political societies.

In response to the extensive dislocation among Indian peoples caused by the General Allotment Act of 1887, and observing the extreme poverty of Indian Nations, the U.S. government enacted the Indian Reorganization Act of 1934 as a kind of "New Deal" for Indian Country. Indian Nations were to have an economic and political relationship with the U.S. that would "maximize political democracy and self-government" among Indian peoples and ensure sufficient economic support to achieve social and economic self-sufficiency. As a practical matter, the IRA which promoters thought would liberate Indian Nations and promote their social, economic and political self-sufficiency became the instrument by which the U.S. government assumed autocratic rule in Indian Country through the Bureau of Indian Affairs.

Felix Cohen observed in his 1942 Handbook of Federal Indian Law: "Self-government is the Indians' only alternative to rule by a government department." He noted that the principle of self-government "includes the power of an Indian tribe to adopt and operate under a form of government of the Indian's choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice." All of these are the attributes of political sovereignty - the exercise of inherent powers. The Bureau of Indian Affairs effectively undercut the exercise of these and other natural powers of governance.

To these conditions, Indian Nations responded by pressing to "reaffirm the desire of Tribal governments to have direct control over all funds within the reservation" - (National Congress of American Indians [NCAI] Resolution #21 - 1948). Through individual actions of Indian governments and through inter-tribal organizations, economic self-determination was further promoted over succeeding years. Their collective effort culminated in the National Congress of American Indians Concurrent Resolution No. 3 in 1957. This became the most comprehensive statement of Indian government policy opposing termination and advocating Indian self-government and economic reconstruction.

NCAI President Joseph Garry further spelled out Indian government endorsement of Concurrent Resolution No. 3 in his testimony when he noted that efforts to terminate Indian Nations by private citizens and the Bureau of Indian Affairs "kept the Indians so busy defending themselves they had no time or even energy for constructive planning or actions" which would enhance self-sufficiency. By 1959, the National Congress of American Indians was compelled once again to issue a comprehensive statement of Indian government policies concerning the social, economic, and political development of Indian Nations reaffirming resolutions adopted in 1956, 1957, and 1958. In NCAI's Statement of National Policy (NCAI, 16th Annual Convention, Phoenix, Arizona), the U.S. government was offered a "guide to administrative action:"

> A plan of development be prepared for each Indian group, whose lands or other assets are held in trust, whether such lands or assets are fully defined or not, such plans to be designed to bring about maximum utilization of physical resources by the dependent population to its full potential, such plans to be prepared by the Indians of the respective groups with authority to call upon the agencies of the federal government for technical assistance, and the ultimate purpose of such planning to be the growth and development of the resources of the people, rather than the heedless termination of federal responsibility for such people;
> That requests for annual appropriations of funds be based on the requirements for carrying into effect these individual development plans, and the annual operating budget for the Bureau of Indian Affairs to include sufficient funds to carry out the program needs of each planning group;
> That such annual budgets include adequate funds to provide for the credit needs and for capital investment, required for the full development of Indian resources;
> That determination with respect to the disposition of property or actions which may affect treaty rights or agreements be based on agreement between an Indian tribe or group and the United States;
> That any transfer of service now provided by the United States for the benefit of Indians be jointly planned with the Indians;
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> * * *
>
> That a concentrated effort be made to retain, rather than dispose of, Indian lands in order to allow the Indians sufficient economic units upon which to improve their economic conditions; and that administrative regulations and practices be reviewed, modified, and amended to bring about such result.

The American Indian Chicago Conference reaffirmed the NCAI Resolution in 1961. By 1966 the patterns of the past continued, and Earl Old Person, Chairman of the Blackfeet Tribe and President of the National Congress of American Indians, reacted to heavy-handed Bureau of Indian Affairs efforts to undermine Indian Nations. He spoke before a Conference in Spokane, Washington:

> Again, I say, "Let's forget termination and try a policy that has never been tried before - development of the Indian reservations for Indians and development of Indians as human beings with a personality and a soul and dreams for a bright future." Why is it so important that Indians be brought into the "mainstream of American life?" What is the "mainstream of American life?" I would not know how to interpret the phrase to my people in our language. The closest I would be able to come to "mainstream" would be to say, in Indian, "a big wide river." Am I then going to tell my people that they will be "thrown into the Big, Wide River of the United States?"

Just as President Joe Garry before him called for a new Indian Affairs agenda "setting aside the idea that Indian Nations should be terminated," President Earl Old Person called for Indian Nations and the United States to focus on "rebuilding Indian Country" - and insuring the perpetual social, economic and political existence of Indian Country. Both NCAI Presidents called upon the United States to recognize the inherent intelligence of Indian people and "their ability to decide for themselves what future they shall have."

After more years of Tribal insistence, President Richard Nixon finally announced a U.S. policy of "Indian Self-determination." The Indian Self-Determination and Education Assistance Act, P.L. 93-638, soon became law. The principle of Indian Self-Government had been finally agreed to by the United States government, but the practices of Bureau of Indian Affairs dominance and intrusion persisted. At the conclusion of the American Indian Policy Review Commission's two-year study in 1977, it was apparent that while the principle of Indian self-governance and the promotion of Indian self-sufficiency functioned as "buzz words" in the U.S. bureaucracy, the practical reality was far from being achieved.

Contracting U.S. government functions to Indian governments had the practical effect of "handing the responsibility of providing services and assistance to Indians over to Indian governments, but holding back the authority to decide with flexibility how to meet the needs of Indian communities." Indian Nations were achieving "self-determination in name only," while the Bureau of Indian Affairs became more intrusive.

As NCAI President, I proposed in a speech before the Fortieth Annual Convention of the National Congress of American Indians in Green Bay, Wisconsin (1983), "that we make a decisive departure from the recurring issues that divert our attention from the most important priorities of initiatives necessary to establish meaningful government-to-government relations with the United States." I proposed to Indian leaders that we take "the next logical step beyond the Indian Self-Determination Act" with the enactment of a Tribal Grant-in-Aid Act, to include:

> The Act would authorize five year financial agreements between Indian Nations and the United States, negotiated to cover Tribal government operations, economic development, housing, health and human services, and other Tribally-determined needs. The Grant-in-Aid would require a line item appropriation from Congress for each Indian government concluding an agreement with the United States as disbursed through the Department of the Treasury. The Act would include a transition clause allowing Tribal governments a supportive bridge from PL 93-638 contracting to grant-in-aid management. Each agreement, of course, would provide that the trust relationship and obligations of the United States will be upheld..

Although a Tribal Grant-in-Aid Act has not been achieved, I believe substantial progress has been made in the Senate Indian Self-Determination Act Amendments of 1987 to streamline the contracting process. The administration's amendment establishing a "Funding Flexibility Demonstration Project" is viewed with both skepticism and hope. Although apparently well-intentioned, this new government proposal was conceived behind closed doors and offered for Senate consideration with little Tribal participation. We hope these demonstration projects will result in a revenue neutral expansion of Tribal control and program operation with a corresponding decrease in BIA involvement and personnel. As history is our guide, we are skeptical with reason.

Some suggest that if Indian governments had sums of revenue which they can appropriate through their own institutions for needs defined inside their own nation there will be graft, waste, and resultant Indian government instability. Of course, these same people ignore the generations of graft, waste, and resultant Indian government instability caused by the Bureau of Indian Affairs; well documented by the Arizona Republic's "Fraud in Indian Country" series of 10/4-11/87 and the Tulsa Tribune's "A Vanishing Trust" series of 11/9-18/87. As Felix Cohen once observed, Indians should be permitted to decide for themselves what is right and wrong, and they should be permitted to make their own mistakes. That is the nature of self-government.

The idea of direct aid to Indian Nations by the United States government will make both the policy of self-determination and government-to-government relations meaningful in practical terms. Indian governments and the nations they represent have won acceptance of the principle of self-determination, now it is time to put the principle into practice.

American Indian Tribal Governments, the United States Government, and Congress Should Engage in Consultations on the Restructuring of the Federal Administration of Indian Affairs

I firmly believe it is appropriate for American Indian Tribal leadership, the Federal government, and Congress to begin consultation and dialogue on the possible restructuring of the Federal management of American Indian Affairs. I don't expect that a new Federal mechanism to protect the trust responsibility and deliver resources or services to be a major expansion of Federal expenditures. I envision that an independent, separate, or autonomous Federal structure would consolidate functions and resources, reduce the size of the Indian Affairs bureaucracy, increase appropriations and management capacities at the Tribal government level, and maximize the utilization of Federal appropriations designated for Indian Country. This new Federal Indian Affairs structure, designed by American Indian leadership and established through formal agreement between Indian Tribes and the United States, could feasibly accommodate the broad spectrum of development needs in Indian Country from those Tribes most dependent on a Federal presence to Tribal governments seeking the greatest degree of self-government.

The Bureau of Indian Affairs is the oldest Federal agency in the United States. In fact, just eight days short of one-year before the Declaration of Independence from England (July 12, 1775), the Continental Congress established three independent Departments of Indian Affairs - the first "executive agencies" of the infant confederation of colonies. [Journal, Continental Congress, Vol. 2, p. 175.] There was a Northern Department, Middle Department and Southern Department. Twelve Commissioners were appointed to make treaties with the Indian Nations to promote "peace and friendship." The Articles of Confederation vested in the Congress "the sole and exclusive right and power of...regulating the trade and managing all affairs with the Indians..." [Articles of Confederation, Para. 4 of Article 9] Writing 50 years later, Joseph Blunt commented in his Historical Sketch - The Jurisdiction Over Indian Tribes on the powers of the government.

> All our intercourse with the Indians, so long as they continued to be independent, was in the way of trade, or in making treaties, and these were placed under the control of the general government. It was not

> contemplated...that Congress should have any legislative power over the Indians; but that it should have the exclusive power to regulate the trade, and to make treaties with them. [Blunt, 1825: 93]

In light of this observation, it may be fairly concluded that the separate Departments of Indian Affairs, and their successors immediately after the establishment of the U.S.A. functioned like a "foreign ministry" extended "directly from the Parliament." Since there was no executive department or executive branch of government under the Articles of Confederation, the Departments of Indian Affairs stood on an institutional plain similar to committees - legislative instrumentalities.

The revolt against the English Crown had begun and the Congress's dependence on aid from Indian Nations - particularly in the North - gave rise to the need to delegate certain Congressional powers over Indian Affairs to the Board of War headed by a Secretary of War. Both the Northern and Southern Departments of Indian Affairs were required to consult with the Board of War. By 1779, the Congress made a much more explicit directive to the Northern Department of Indian Affairs, that it consult with General George Washington in treaty matters and to follow his direction. [Journal of the Continental Congress, Vol. 14, p. 600]

By virtue of the "Ordinance for the Regulation of Indian Affairs," [August 7, 1786] the Continental Congress reorganized the Departments of Indian Affairs into two agencies - one in the North and one in the South, divided by the Ohio River. Each Department was headed by a superintendent. By 1789, the Continental Congress appropriated funds for Governors of various territories to serve ex officio as Superintendent of Indian Affairs. Agencies of the Departments of Indian Affairs were first established, somewhat casually, in 1792 with "special agents" who were charged with diplomatic missions to "reside among the Indians." By 1818, there were 15 agents and 10 assistants or sub-agents. In that year, Congress passed a law [3 Stat. 428] requiring that all agents be appointed by the President with the advice and consent of the Senate.

Indian Affairs remained a responsibility of the Board of War and its successor under the United States Constitution, War Department, for sixty years. The War Department created a Bureau of Indian Affairs on March 11, 1824. In 1832, the Congress officially authorized a Bureau of Indian Affairs in the War Department, and the Commissioner of Indian Affairs was described as having "the direction and management of all Indian affairs and of all matters arising out of Indian relations" under the direction of the Secretary of War. From the end of the revolt against England, Indian Affairs policy began to shift from mutual dependence to an undeclared war by the U.S. government on Indian Nations. While the newly created U. S. government (1789) regarded trade and treaty-making with Indian Nations still necessary, its interest turned more in the direction of displacing Indian Nations and expanding its territory.

During its tenure in the War Department, the Bureau of Indian Affairs functioned as a diplomatic agency. It negotiated treaties, regulated trade, and administered treaty responsibilities. The primary concern was with matters of war and peace, and "civilizing the savages." By the middle of the 19th Century, these concerns shifted to the administration of land transfers and less so war and peace. This shift in concern resulted in a shift of administrative responsibility. The U.S. had taken or acquired massive territories under its control as a result of wars and treaties with Indian Nations and colonizing European states. Following the establishment of the Department of the Interior, the Bureau of Indian Affairs was transferred from the War Department to the Interior Department (1849). The charge of the new Interior Department was to administer "the transfer of public lands into the possession of private owners." The Bureau of Indian Affairs assumed a major responsibility in the new department since most of the "public lands" and potentially public lands were in the possession of Indian Nations or formerly under the control of Indian Nations.

Despite the charge of its "parent department," the Bureau of Indian Affairs acquired additional responsibilities involving the delivery of services and assistance to Indian Nations. Indeed, while the Bureau of Indian Affairs was mainly an agency for transfer of land from 1849 to the 1920s, it assumed quasi "governing authorities and responsibilities" in just the last 67 years.

I have provided this historical brief on the Bureau of Indian Affairs to outline the evolution of the Agency through this nation's history. We now experience a multi-layered bureaucracy in the BIA with bureaucratic roles and responsibilities duplicated at each government level. The Indian Health Service mirrors the multi-layers and duplications in the Department of Health and Human Services. Other Federal programs, designated to assist Indian Country, are scattered throughout the Federal bureaucracy. And the Federal government, particularly the BIA and IHS, consume a major proportion of funds earmarked for American Indian peoples.

Indian leaders over the last one hundred years have sought an array of Federal structures with Cabinet-level status to manage Indian Affairs. In 1974, the National Congress of American Indians unanimously endorsed a position paper entitled, Proposal for Readjustment of Indian Affairs [NCAI Convention, San Diego, California, October 24, 1974] which urged "the establishment of independent federal governmental machinery to replace the Bureau of Indian Affairs." The companion statement by NCAI in 1974 was the American Indian Declaration of Sovereignty which proclaimed:

> Establish a single, independent, federal governmental instrumentality with concurrence of the majority of the recognized aboriginal American Indian tribes and nations, in order to implement and guarantee the treaty responsibilities and trust obligations of the United States of America under Article Six of the Constitution of said nation. (emphasis supplied)

The idea of "independent, federal governmental instrumentality" persisted into discussions and hearings and the final report of the American Indian Policy Review Commission (AIPRC) in 1977. After two years of hearings across the country, and conducting its own study of the Bureau of Indian Affairs, the AIPRC recommended to the U.S. Congress:

> The President submit to Congress a reorganization plan creating a Department of Indian Affairs or independent agency to be comprised of appropriate functions now mainly administered by the Bureau of Indian Affairs, Indian Health Service, and agencies within the Interior and Justice Departments - Rights Protection be consolidated...[AIPRC Final Report 1977: 297]

Although these proposals have all had merit, neither the Tribes, the Federal government, nor Congress have been able to come to any agreement due to Tribal concerns over the potential diminishment of trust protections, administration unwillingness to relinquish established operational patterns and powers, and Congressional apathy. As a logical extension of Senate Concurrent Resolution 76, Congress should initiate a consultation process with Tribal leaders to determine options for a new, effective Federal mechanism more responsive to Indian Country needs.

Establishing a Consultation Process Between the United States and Tribal Governments

Obviously, any restructuring of the Federal management of Indian Affairs will require extensive dialogue, debate, and negotiation to achieve a mutually agreeable strategy and structure. I urge consideration of establishing a formal consultation process between Tribes, the succeeding United States administrations, and Congress. It is literally essential that Tribal leadership is directly involved in improving the Federal administeration of Indian Affairs.

Tribal governments and their leaders, when directly involved in the development of agreements, have proven the importance of their direct involvement. A recent example is the ratification and implementation of the U.S.-Canada Pacific Salmon Treaty ratified by Congress in 1985. Twenty-four Pacific Northwest Tribal representatives were substantively involved in the treaty negotiation process involving the Departments of State, Commerce, and Interior; the States of Washington, Oregon, and Alaska; and Canadian representatives. Tribal representatives, as included in the Treaty, serve on the Commission and fisheries panels.

In the State of Washington, the Timber-Fish-Wildlife Agreement also involved negotiations between Washington State Tribes, private industry, and Washington State to conclude agreements to protect, preserve, and rehabilitate the environment.

As the Senate Select Committee on Indian Affairs initiates field hearings on Senate Concurrent Resolution 76, Tribal witnesses will offer enlightening concepts and ideas to improve the management of Indian Affairs. Hopefully, these hearings will prove most instructive on the importance of involving American Indian people in the policy and programmatic decision-making processes affecting their quality of life.

I appreciate the opportunity to testify and would be pleased to respond to any questions.

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TESTIMONY OF LARRY G. KINLEY, CHAIRMAN OF THE LUMMI INDIAN TRIBE, BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS HEARING ON SENATE CONCURRENT RESOLUTION 76

December 2, 1987

I appreciate the privilege and honor to testify before the Senate Select Committee on Indian Affairs on Senate Concurrent Resolution 76. This acknowledges the contribution of the Iroquois Confederacy of Indian Nations to the development of the United States Constitution and reaffirms the commitment to continuing government-to-government relationships between Indian Tribes and the United States of America. We endorse this resolution and hope that it shall serve to educate the American public as to Tribal sovereignty embodied in the U.S. Constitution and create meaningful improvements between Indian Tribes and the United States.

On behalf of the Lummi Indian Nation, I recently participated in an inter-tribal exchange known as the Alliance of American Indian Leaders, as affiliated with the Indian Rights Association in Philadelphia, in commemoration of the U.S. Constitutional bicentennial. The theme of this forum was "In Search of 'A more Perfect Union:" American Indian Tribes and the United States Constitution." While the forum was enlightening, and saddening as well, it provided an opportunity for our Tribal government to address our concerns regarding the constitutionality of the current relationships between "Indian" people and the United States. With that forum in mind, the Lummi Indian Tribe welcomes this Congressional Resolution, which:

> -"reaffirms the constitutionally recognized government-to-government relationship with Indian Tribes..."
> -"Specifically acknowledges and reaffirms the trust responsibility and obligations of the United States Government to Indian Tribes, including Alaskan Natives, for their preservation, protection, and enhancement..."
> -"acknowledges the need to exercise the utmost good faith in upholding treaties with the various Tribes, as the Tribes understood them to be,..."

We urge the Senate Select Committee on Indian Affair to serve a strong advocacy role to ensure that these policies translate into meaningful reality for American tribal governments and their peoples.

Our testimony will address several concepts for consideration and deliberation as to what we consider important elements of Senate Concurrent Resolution 76 relative to our government-to-government relationships. Then, our testimony generally addresses "Concerns of An Indian Nation-Lessons on Fluctuating U.S. Federalism" and concludes with an historical review of the development of the current definition of the U.S. Constitutional provision of "excluding Indians not taxed" (Article I, Section II, Clause 3). This constitutional clause has been a focal issue in the on-going dispute between the Treaty Tribes of the Pacific Northwest, and more specifically the Lummi Indian Tribe, and the Internal Revenue Service efforts to tax Tribal members' incomes derived from a treaty-protected resources. This controversy involving a Federal intrusion into Treaty-protected resources was a deciding factor in our tribe's participation in the planning of the Philadelphia forum.

DOES THE BUREAUCRACY EXIST FOR THE BENEFIT OF TRIBAL GOVERNMENTS OR DO INDIAN TRIBES ENDURE FOR THE BENEFIT OF THE BUREAUCRACY? The basic issue confronting us today is a cumbersome, unwieldy bureaucracy built layer upon layer over the years being pressured by frustrated Tribal governments yearning for sovereign independence in the management of their affairs and seeking a larger share of the resources allocated for their benefit. The great Felix Cohen stated it so well many years ago:

> "The most basic of all Indian rights, the right of self-government, is the Indian's last defense against administrative oppression, for in a realm where the states are powerless to govern and where the Congress, occupied with more pressing national affairs, cannot govern wisely and well, there remains a large no man's-land in which government can emanate only from officials of the Interior Department or from the Indian themselves. Self-government is thus the Indians' only alternative to rule by a government department." (Handbook of Federal Indian Law, 1942; 122)

American Indian Tribes, as sovereign governments empowered by aboriginal rule and recognized by Treaties with the United States as embodied in the U.S. Constitution, have a "trust" relationship with the United States, in its commitment of support and protection. Over the last two centuries, the reality of this commitment has ebbed and flowed according to prevailing political sentiment in Congress and the Federal bureaucracy. Unfortunately, over the many generations, the United States has exercised control and manipulation over Indian people creating dependency and extreme poverty. We are locked into a Federal system increasingly resistant to dynamic Tribalism and forcing Tribal governments to mirror Federal programs and priorities established for the general society.

More often than not, the United States government has acted in a way contrary to its Trust responsibility when it seeks to separate individual members of an Indian nation and force adherence to U.S. laws, values, and systems. Through direct intervention in the internal affairs of an Indian nation, the United States has deliberately undermined the political, economic, and social stability of Indian societies to achieve the disintegration of Indian Nations. Not only is such intervention morally reprehensible, but it violates the principle of "sacred trust of civilization" and virtually all customary and codified rules of conduct between Nations and between Nations and States.

TRIBAL SELF-GOVERNMENT DESERVES UNITED STATES SUPPORT, BUT DOMESTIC SYSTEMS AND SOCIETY STAND AGAINST US. We desire self-government and the opportunity to reflect our unique tribalism on the general society. Unfortunately, Federal and State bureaucracies as well as society in general apparently want American Indian Tribes to fit into the established mold. I appreciate the insight of Milner S. Ball in his conclusion of his "Constitution, Court, Indian Tribes" in the American Bar Foundation Research Journal (Vol. I, Winter, 1987), observing:

> Tribalism offers the hope of empowerment. Non-Indians have consistently resisted acknowledging the validity of the way Indians live together and govern themselves. Tribalism is typically viewed as a lower form of Western society, and Indians are perceived as aspiring, or needing to aspire, to the higher life of non-Indians. The Tribe, however, is not a lower evolutionary form of our society. It took root in this land long before the coming of the Europeans. Remarkably, it has adapted, survived, grown, been renewed. It is a different reality.
>
> I do not mean to romanticize the Tribe. That would be to trivialize it. I do mean to say tribes demonstrate that the political structures designed by 18th-century newcomers and the society that has followed are not the only way to live in this land.
>
> Tribes teach us that the non-Indian system is not the only American way, the dominant structures are contingent, an invention that can be reinvented. Just the fact of the tribes' continuing existence presses a range of fundamental questions, including these: Where are Indian nations to fit in our Federal system? Should they be made States? Should they be related to the United States by Treaty? What are the possibilities of Treaty Federalism?

We seek the opportunity to govern ourselves as recognized sovereign nations. But, we question the will and resolve of the Congress and the established Federal system to allow this logical concept to become a reality. Established political systems and entrenched bureaucracies stand as formidable obstacles to the intentions of Senate Concurrent Resolution 76.

THERE ARE NATURAL TENSIONS BETWEEN SOVEREIGN NATIONS OVER JURISDICTION. Many people urge the view that inside the boundaries of the United States there cannot be distinct nations or States which exercise inherent political sovereignty and full powers of jurisdiction. What these individuals fail to understand is that such circumstances already exist in the United States, and have existed since the formation of the U.S. Republic. Under the U.S. Constitution there are no fewer than 50 distinct sovereignties-all are members of a federal union. Relations between the members of the federal union are characterized by persistent tensions over powers of sovereignty and powers of jurisdiction. Similar tension exist between each member of the federal union and the Central government which was created by the various members.

Just as there are 50 distinctly sovereign members of the federal union, there are approximately 300 distinctly sovereign Indian nations which are not members of the federal union. Like members of the federal union and the United States government itself, Indian governments are engaged in tensions with their neighbors over questions of sovereign powers and jurisdiction. But, unlike their neighbors, Indian nations have few intergovernmental alternatives to resolve these tensions. As political entities outside the U.S. Federal system, Indian Nations rely on relations with the United States through treaties and other agreements and the protection and assistance of the U.S. government when attempting to deal with disputes over jurisdiction and sovereignty.

Tensions between Nations and between Nations and States over sovereignty and jurisdiction are a natural consequence of geography. To reduce these tensions, or direct the tensions toward peaceful resolution, mechanisms are established between governments. Government-to-government relations, formalized to ensure appropriate resolution of disputes and mutual cooperation, are the customary means for neighbors to deal with one another.

It is peculiar fiction of contemporary dialogue on the subject of sovereignty of Indian Nations that somehow Indian Nations are only partly sovereign. While such a suggestion may be satisfying to those who would deny the political existence of Indian nations, it is an idea without foundation. Like any Nation or State, Indian Nations have inherent powers of sovereignty and may exercise those powers wholly or partially. By exercising such powers partially, it cannot be said that an Indian Nation does not have the right to exercise all of its powers fully.

CONCERNS OF AN INDIAN NATION - LESSONS ON THE FLUCTUATING U.S. FEDERALISM. In 1983, President Reagan's White House Indian Policy Statement promoted the concept of maintaining a government-to-government relationship" between the United States and the Indian tribes, as follows:

> "When European colonial powers began to explore and colonize this land, they entered into Treaties with sovereign Indian nations. Our new Nation continued to make Treaties and to deal with Indian Tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian Tribes has endured. The Constitution, the Treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold."

Relations between Nations and relations between Nations and States have evolved over centuries, and from these interactions there evolved a body of customs which is codified into a body of international laws. Customary international relations typically recognize that there are times when greater powers may be granted or may assume the responsibility for protecting and assisting lesser powers. When such circumstances occur, the greater power is said to assume the responsibilities of the "sacred trust of civilization." This principle was enunciated as early as the 16th century by Francisco de Vitoria during the Spanish colonialization of the New World. The principle of the "sacred trust of civilization" placed the obligation on a greater power to treat a lesser power in a way which promoted the well being and self-determination of lesser power peoples.

This principle was endorsed by the Berlin Conference in 1884-1885 and amplified to note that: By a lesser power taking the protection of a greater power, the lesser power retains its full powers of sovereignty - precisely the terms used in the U.S. Supreme Court case Cherokee vs. Georgia 5 Pet. 1 (1831). This conception of the "sacred trust of civilization" was embodied in the League of Nations Mandate System and later in the United Nations Trusteeship System.

Keeping this lesser power to greater power relationship in mind, Indian tribes, nations, and people have repeatedly expressed the need to determine their own destinies." Indian people need the ability to access their own future, freedom of the restrictive paternalism of the federal government; but, more importantly, free to decide for themselves the type of communities, political forums, court systems, individual rights and liberties, and economic development that fits their needs, based on values inherent to the tribal community and society.

The "Policy" of the President, Congress, and the Courts have fluctuated, often under the banner that it is always in the best interests of the Indian people. That Indian country and leaders find it very difficult to believe that any changes in the Federal/Indian relationship will be to the best interests of the Indian is understood when viewed from the historical lessons. For example, the General Allotment Act of 1887 (U.S. Statutes at Large 24-388-91), and its amendments, was supposedly in the best interests of the Indian, and in the end it deprived the Indian people of 90 million treaty-protected acres, in violation of the second clause of the sixth article of the U.S. Constitution: wherein it states: "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties which shall be made under the authority of the United States, shall be the supreme law of the land;"...Keeping this in mind, Indian leaders are highly skeptical when new legislative solutions or policy changes are proposed "for the best interests of the Indians."

U.S. COURT SYSTEM NOT AN APPROPRIATE FORUM TO DETERMINE QUESTIONS OF TRIBAL SOVEREIGNTY AND JURISDICTION. It is often said that the U.S. Court System is the greatest protector of the rights of Indian Nations, and that we should feel secure in this knowledge. Unfortunately, Indian Nations cannot take comfort from this widely proclaimed view. Since the U.S. Supreme Court reviewed the case of Cherokee vs. Georgia, it has been apparent that U.S. domestic courts are not legally competent to consider issues of dispute involving questions of the political sovereignty and jurisdictional powers of Indian Nations. When the Courts have considered such issues in connection with Indian Nations, they have more often than not taken positions which permitted the U.S. government to undermine national sovereignty and erode the jurisdictional powers of Indian governments.

The only appropriate arena for dealing with questions relating to political sovereignty and jurisdiction is direct government-to-government relations; an avenue the U.S. Congress sought to foreclose in 1871 by adopting legislative policy intended to stop treaty-making between the U.S. and Indian Nations. Muted forms of direct government-to-government relations continue to the present day despite the 1871 Act. The political development of Indian Nations has been hampered and even undermined as a consequence of deliberate efforts to shift "political questions" into the U.S. Court System. Virtually all Treaty disputes between the United States and Indian Nations involve the question of political sovereignty and jurisdiction. And, most questions of dispute involving Indian Nations and the United States concern Treaty interpretations, which should be resolved through direct negotiations within a framework of government-to-government relations, and not in the U.S. Courts.

EACH INDIAN NATION MUST BE ADDRESSED AS A SEPARATE SOVEREIGN NATION. The different histories, circumstances and conditions which surround each Indian Nation require that each nation be treated as a unique political entity. This is so primarily because each nation is a single entity; and, because failure to treat nations individually hazards the probability that the interests of each nation will be either ignored or, worse, undermined by generalization.

The U.S. Court System has a tendency to treat disputes involving Indian Nations as a kind of "generic Indian problem." A decision concerning "one Indian" may often be applied to "all Indians." A decision concerning "one Indian Nation" may be applied to "all Indian Nations." This tendency flows from the mistaken belief that there is a homogenous Indian population. The mistake comes in part from applying the generic term "Indian" to all situations involving the first nations in North America. The mistake also flows from a misreading of history and a tendency to rewrite history in the Courts. There are more than 300 Nations inside the boundaries of the United States, and each has particular characteristics and relations with the United States that cannot be generalized. The product of treating subjects as if there is a "generic Indian" is faulty thinking, inaccurate judgment, and confusion.

Actually, in all three branches of the U.S. government, there is a tendency to generalize and over-generalize the first nations of this land. Continuation of this practice will simply further corrupt the political integrity of each nation and destroy nations with words.

In considering what establishing "government-to-government" relations means, each Indian Tribe or Nation has its own political-legal viewpoint and agenda. Some leaders want to challenge the 1887 General Allotment Act, or Public Law 280, or eliminate as a matter of good-faith House Joint Resolution #108. Some want to address the assumption of criminal and/or civil jurisdiction by individual States or the federal government. Whatever the question, there is an in-common denominator to most of the problems experienced by Indians, nationwide. This denominator is used to justify U.S. jurisdiction and sovereign control over Indian people, territory, and resources. The United States claims to have made Indian people "U.S. Citizens." This political denominator is then used to justify federal enactments which regulate Indian lives and property. The Politicians of the individual States collectively and congressionally rule what Indian Tribal governments can and cannot do. The original relationship was for Indian governments to continue in force and to rule as they always had, over their own people and territories.

SERIOUS QUESTIONS REVOLVE AROUND THE INDIAN CITIZENSHIP ACT. Indian Leaders of the Lummi Tribe believe there is a need to seriously consider the constitutional impact of the "1924 Indian Citizenship Act" (U.S. Statutes at Large, 43:253) and the effect it has created in the questions of sovereignty and jurisdiction. This legislative enactment was just another "generic" approach to resolving the perceived Indian problems and conflicts usually connected with disputes over treaty-protected Indian resources. Keeping in mind the historical approach to solving conflicts with Indian Nations, it must be questioned as to what did the original concept of "subject to the jurisdiction thereof" mean, as defined by the framers of the constitution. The attached article on "Citizenship v. Excluding Indians Not Taxed" provides for a historical definition of these important constitutional words.

In brief, in the minutes of the Reconstruction Debates, which followed the Civil War, it is noteworthy that the Congressmen argued that Indians are not "subject to the jurisdiction thereof." Because Indians were not subject to the complete jurisdiction of the United States, the Executive Branch negotiated treaties with the tribes. In the beginning, treaties between the United States and Indian tribes were meant to keep their people separate from ours, and to divide territory and maintain boundaries. Unless otherwise agreed, the other type of contact would be "trade or commerce" between the political sovereigns. The U.S. was to regulate conditions of exchanges, regarding their citizens conduct. This concept was not strange in view of the history of the States' citizens behavior and actions toward Indian people. The U.S. is accustomed to regulating its citizens' commerce amongst the several States and foreign countries. However, the U.S. congressional regulation of Indian country has been, for the most part, economically restrictive and contrary to the best interests of Indian country. It has been more of the case that Indian commerce is restricted. Unless congressionally authorized, Indian governments and people are not granted equal standing in the political and economic community of the Union.

TRIBAL ECONOMIC DEVELOPMENT CAPACITIES LIMITED BY POLITICAL REALITIES. There has not been any real beneficial exercising of the "Indian Commerce Clause" of the U.S. Constitution (Article I, section 8, Clause 3), except for "token" legislation such as the "Indian Self-Determination and Economic Development Acts" and the "1982 Indian Tax Status Act." While such enactments are more than what has been available before, it is not enough. The real problem surrounds Congressional refusals to allow tribes to compete with State economies. Tribes are politically hampered by lack of "congressional authority" to develop economically, free of the imposition of external taxing authority. When in doubt, non-Indian governments resort to "their courts" to slow down or circumvent economic development on Indian reservations, developments that would compete with non-Indian economies. There is not much sympathy amongst "State" Congressmen. They are placed into office to represent the non-Indian "citizens" that control the voting system through their numerical strength.

American Indian Tribes must resort to extensive and expensive litigation to clarify questions on the types of economic development and self-government "allowable," within the American system. There are limited opportunities to create dynamic economies when an excessive federal bureaucracy controls access to revenue for infrastructure financing and governmental support.

The American Indians are very familiar with existing economic limitations and the affects upon our people, territory, resources, culture, politics, and future. Our people have the highest unemployment/underemployment, highest infant mortality, shortest life expectancy, and lowest education attainment levels in the nation (See: Report of the Task Force On Indian Economic Development, Department of Interior, 1986). While one-quarter of the Indian people reside within the boundaries of the reservations, another thirty-percent reside along the boundaries. This is due to two reasons; the lack of housing on reservation and the massive land heirship problems caused by federal control of land inheritance. The majority of those not on or near the reserves have left in search of work and subsistence. As Tribal governments, we are not in control of our respective economies. Existing laws and regulations from Federal/State enactments limit us.

Some suggest that the relationship between Indian Nations and the United States should forever remain in a condition of confusion and uncertainty and not become a dynamic relationship-growing and changing. Indian Nations must have the same opportunities for political, economic and social development as do all others. But, to grow and change according to our natural right must not be confused with the often expressed belief that Indian Nations should either remain forever in a trust relationship with the United States of America or forever disappear. The evolving relationship cannot be a "do or die" concept. Indeed, in the last 28 years, the Federation of Micronesia (formerly a part of the trust

Territory of Micronesia) demonstrates that a protected nation and the United States of America have the capacity to dynamically change their political relationship if they are prepared to enter into direct government-to-government negotiations. Political development,which is assured to other nations protected by the United States, must also be an option to Indian Nations.

Indian governments are experiencing jurisdictional problems on reserves because the United States has assumed jurisdiction. The United States management of their obligations committed to Indian Tribes and people through the Bureau of Indian Affairs has resulted in alienating tribal and individual lands and resources under auspices of federal law, most often contrary to the desire of the Indian "wards." This, then, has caused pervasive checkerboard jurisdiction problems on Indian reservations (usually resultant of the General Allotment Act of 1887 (U.S. Statutes at Large, 24:388-91)). In enactments such as the Major Crimes Act, the General Allotment Act, and the Termination Policy of H.J.R. 108, the United States government has severed ties the individual Indian had with his tribal government, and more basically to the treaty-protected land and resources.

The United States government has acted in a way contrary to its Trust Responsibility when it seeks to separate individual members of an Indian Nation and force adherence to U.S. laws, values, and systems. Through direct intervention in the internal affairs of an Indian Nation, the United States has undermined the political, economic and social stability of Indian societies and caused the disintegration of Indian Nations. Such activity violates the principle of the "sacred trust of civilization" and virtually all customary and codified rules of conduct between Nations and between Nations and States.

American Indians will not be able to rid reservations of impoverishment, under/unemployment, high infant mortality, the short life expectancy, or see a rise in educational attainment of our youths, or just generally improve economic conditions, until such time Indian people and their governments control their own destinies, territories, and economies. Indian people need more than a promise of a better future. To overcome the problems will require true self-determination and self-government. This will require eliminating the application of especially State and federal jurisdiction over Tribal governments.

THE QUESTION REMAINS: WHAT IS THE CONSTITUTIONAL RELATIONSHIP BETWEEN INDIANS AND THE FEDERAL GOVERNMENT? The framers of the Constitution intended that the United States and Indians would remain separate. Article I, section 2, clause 3, excludes Indians from citizenship by the words "excluding Indians not taxed." This clause was reiterated in section 2 of the Civil Rights Act of

1866. It was kept in the 14th Amendment in section 2. And, the words "subject to the jurisdiction thereof" in section 1 of the 14th Amendment meant that Indians could not be citizens because they were not totally and completely subject to the jurisdictions of the United States. Section 1 applied to anywhere in the jurisdiction of the United States, and section 2 applied within any State. While it is noted that individual Indians could cut their ties with their tribes and leave Indian country/reservations and become a citizen, if he subjects himself to the complete jurisdiction of the United States and ratified up allegiance to the tribe, then he qualified to become a U.S. citizen. Of course, the U.S. could choose to amend Article I, under the process mandated by Article V, and constitutionally force their "citizenship" upon the Indian Nations' peoples.

The relationships between the U.S. and Indians was to be by treaty, as the President was empowered to negotiate, and the Senate to "Advise and Consent", under Article II, section 2, clause 2. The power to negotiate binding treaties with the Indians was reserved to the Union and the States were prohibited from doing so by Article I, section 10, clause 1. Just as the President did not have to negotiate treaties, the Senate did not have to ratify (as was the case with 18 treaties with California Indians in the mid 1850's, and after 1871). However, once ratified, the treaties become the supreme law of the land, under Article VI, section 2. The House of Representatives could, but does not have to agree to, originate appropriation bills to pay for obligations committed by treaty. Treaty violations by the citizens or their governments would be subjected to the jurisdiction of the federal courts, under Article III, section 2, clause I. And, the President was empowerd to enforce the treaty provisions - as Commander in Chief or Chief Executive.

Further indication of the separate nature of the Indian Nations and the United States races is found in the wording and intentions of Article I, section 8, clause 3, per the power to regulate trade with foreign nations, amongst the several States, and with the Indian tribes. This was mainly to prevent unscrupulous practices by States and their citizens. This "Indian Commerce Clause" has been interpreted to mean that Indians are in need of guardianship. This line of reasoning has been the basis of the "trust doctrine." Its constitutional foundation is indeed questionable.

A NATIONAL SENTIMENT OF MORAL AUTHORITY HAS CREATED A SHAMEFUL HISTORY OF LEGAL, ECONOMIC, AND RELIGIOUS ABUSE. Irrespective of the constitutional foundation for the separation of Indian Nations, the U.S. Congress has legislated us to be their citizens. Under authority of the Constitution, treaties were negotiated to prevent unjust taking of Tribal property and rights. Indian Nations and their peoples were "acculturated" over the last two centuries as American society increasingly intruded on Tribal systems. Our difference is unqiue, but not necessarily tolerated. The courts and Congress have model decisions over the years which have devasteated Tribalism in many instances. And greed, coupled with righteousness, have destroyed lives, families, lifestyles, and cultures. Citizens look away in disbelief and wonder "How?" And we stare back wondering: "Why?"

The image of "Indian" amongst the general society is based on slanted media/movies, and a history written to justify actions of taking without compensation, in most situations. There is a "near natural" tendency of non-Indian public to view the American Indians in the most negative light. Often it has been argued that the Red Man must be CHRISTIANIZED. Only then could he ever be civilized. However, in regional attempts to Christianize the Red Man the story ending had always proven the same. While the Red Man was relieved of title to his aboriginal lands and resources, his form of government was attacked or destroyed, his childeren were removed from the influence of the family and community, and his language was outlawed, as were the ceremonials and traditional religions given to the Red Man by the Creator. The power of the Bible (Christian Religions) and the sword (U.S. Politics and federalism) were wielded against the Red Man as a matter of alleged God-given righteousness under governmental policy. Some of the most harmful governmental policies and legislative enactments have been enacted in the name of God with alleged benefits to the Indians, Eskimos, and Aleuts. Many legislative enactments were lobbied by, supported by, and introduced at the request of the Churches and Missions to change us toward the non-Indian image.

With the latter facts in mind, the nine major Pacific Northwest Christian denominations has issued a PUBLIC DECLARATION TO THE TRIBAL COUNCILS AND TRADITIONAL SPIRITUAL LEADERS OF THE INDIAN AND ESKIMO PEOPLES OF THE PACIFIC NORTHWEST, ON THE 21st of November, 1987. (See enclosures) These religious leaders have committed to directly participate and strive toward making this a NATIONAL PUBLIC DECLARATION. In conjunction with Senate Concurrent Resolution 76, such Public Declarations can greatly assist in helping the American public accept and respect the Indian people and their form of government-aboriginal democracy.

CITIZENSHIP OR "INDIANS NOT TAXED"

The American Indians were once referred to as the "Indians not taxed in the Constitution." This principle concept was a reflection of the separateness between the United States Citizens and the "Indians not taxed." Neither the States or the Federal government viewed the Indians as citizens or within their taxing power, originally. It was the intention of more than 350 treaties made between Indians and the United States government to keep each others' people and territories separate.

Indian Tribes, nationwide, have been watching the recent "legal" confrontations between the Federal government - Internal Revenue Service, and Lummi "Indians not taxed." This issue is not new to the United States of America. The definition quoted was developed by the Founding Fathers of the Constitution, and retained through the Reconstruction Debates that ended with the ratification of the Fourteenth and Fifteenth Amendments. Ever since the enactment of the 1924 Indian Citizenship Act, court room battles have been waged against Indian Country...."Indians not taxed." The Internal Revenue Service argues that because Indians were Congressionally made citizens, by this act, that they are subject to all the tax laws of general application to all other citizens, irrespective of the constitutional wording in Article I and the 14th Amendment!

The leading tax case cited by the federal attorneys is that of Squire v. Capoeman, 351 U.S. 1 (1956), in which the Supreme Court considered whether capital gains from the sale of standing timber on lands allotted to noncompetent Indians was subject to the federal Income tax. The court began its analysis in Squire with the principle that: "Indians are citizens and... in ordinary affairs in life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." This leading case was used to argue against treaty resource income exemptions of the Pacific Northwest Indian tribes. In Earl v. Commissioner, 78 T.C. 1014 (1982) it was argued that "treaty Indians" were "citizens" and all citizens pay taxes, therefore Indians will have to pay federal income taxes on treaty derived income, namely, the commercial harvest of salmon from treaty-designated waters reserved specifically as a right in our treaties.

Treaty Tribes consider opinions of the Department of Justice (1985), as supports the Internal Revenue Service, to be seriously flawed in legal logic. This logic is that tax exemption language should have been included in the Treaty of Point Elliott in 1855. The first constitutionally authorized Federal income tax law, however, was not enacted until 1913. A logic most absurd, yet currently promoted by the IRS and Justice Departments in 1987!

The legal foundation to the Internal Revenue Service's arguments in all its cases in "tax court" is the "citizenship" of American Indians. The 1924 Indian Citizenship Act claims to have made all Indians citizens, but the original wording of the United States Constitution - and in its present form - defines American Indians as "Indians not taxed." While it is easily surmised an act of Congress is not a proper constitutional amendment, there remains the question as whether or not "excluding Indians not taxed" is still valid constitutionally; or is the Internal Revenue Service right in its presentations that American Indians are "citizens of the United States of America," and "subject to the jurisdiction thereof."

Hereunder, we look to the United States Constitution for the current wording that is definitive of the relationship the American Indian has to this constitutional government.

David Hutchison, in THE FOUNDATIONS OF THE CONSTITUTION (p. 35), points out the history of the Rule of Apportionment. On March 6, 1783, the Committee on Revenue made a report to Congress, one part of which proposed to abolish article eight of the Articles of Confederation which made land the basis of taxation, and to substitute an article providing that the common treasury be supplied by the several states in proportion to the number of inhabitants of every age, sex, and condition, except Indians not paying taxes in each state, which number shall be triennially taken, and transmitted to the United States in Congress assembled in such mode as they shall direct, and appoint, provided always that in such enumeration no persons shall be included, who are bound to servitude for life, according to the laws of the state to which they belong, other than such as may be between the ages of --- years. It is obvious that we have here the first outline of the clause in the constitution. On April 18th, the revenue plan was passed by Congress as amended."

Article I, section 2, clause 3 of the Constitution provides that:

"Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, excluding those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons...."

The expression, excluding Indians not taxed, is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. It appears therein as follows:

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed...."

In the debates of the federal constitutional convention of 1787, there is little said about the relationship the Indians bore to the United States. On the other hand, the problems of apportionment of representatives and direct taxes were cause of great debate and extensive writings. In view of this, it is only reasonable to assume that the delegates to the convention were so clearly cognizant of the meaning of the phrase "Indians not taxed" as to render any consideration of it unnecessary.

Indians, members of sovereign and separate communities or tribes, were outside of the community of people of the United States even though they might be located within the geographical boundaries of a state. Their status was well described by Chancellor Kent when in 1823 he said:

"Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes. They are not our subjects, born within the purviews of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities...."

"Again, in 1776, Congress tendered protection and friendship to the Indians, and resolved, that no Indians should be employed as soldiers in the armies of the United States, before the tribe, to which they belonged, should, in a national council, have consented thereunto, nor then, without the express approbation of Congress. What acts of government more clearly and strongly designate these Indians as totally detached from our body politic, and as separate and independent communities." (Goodell v. Jackson, 20 Johns. 693, 711.)

"To describe these Indians who were not a part of the community of people of the United States the phrase "Indians not taxed" was chosen. The reasons for the choice of the particular phrase are easily surmised. It reflected, first, the prevalent notion that taxation and representation should go hand in hand. It reflected, secondly, the fact that in a less complex system of government taxation is the principle criterion of government authority. No more significant attribute of the condition of the Indian living in his separate and independent community should have been chosen. Being outside the control of either State or Federal Government, he was an "Indian not taxed," and since he did not bear the financial burden of the government, he was not entitled to representation therein." (United States v. Kagama, 118 U.S. 375, 378.)

In the case of (Elk v. Wilkins), John Elk, an Indian that had asserted to have permanently severed his ties with his tribe, and taken up residence among the Whites, had claimed that he was denied his right to vote on the ground that he was not a citizen. The Supreme Court considered the question as to whether or not he was covered by the first clause of the first section of the Fourteenth Amendment of the United States Constitution, by which it is provided, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." The Supreme Court held that:

> "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born with the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

This view is confirmed by the second section of the Fourteenth Amendment, which provides that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens...(112 U.S. Reports, 98-99, 102, 109)

The conditions of these Indians as a people separate from the community of people of the United States had not changed by the time of the adoption of the Fourteenth Amendment. Their exemption from the application of States laws had been affirmed by the Supreme Court on more than one occasion. (Worcester v. Georgia, 6 Pet. 515)

At the same session of the Congress which approved the Fourteenth Amendment and submitted it to the States for adoption was the Civil Rights Bill of 1866: Act of April 9, 1866 (14 Stat. 27). It provided that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."

The Solicitor for the Department of Interior in his Opinions of The Solicitor, November 7, 1940 stated: In the bill as originally reported from the Judiciary Committee there were no words excluding "Indians not taxed" from the citizenship proposed to be granted. Attention being called to this fact, the friends of the measure disclaimed any purpose to make citizens of those who were in tribal relations with government of their own. In order to meet that objection, while conforming to the wishes of those desiring to invest with citizenship all Indians permanently separated from their tribes, and who, by reason of their residence away from their tribes, constituted a part of the people under the jurisdiction of the United States. Mr. Trumbull, who reported the bill, modified it by inserting the words, "excluding Indians not taxed." What was intended by that modification appears from the following language used by him in debate?"

"... Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be subjects of the United States in the sense of being citizens. They must be excepted. The Constitution of the United States excludes them from the enumeration of the population of the United States, when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding Indians not taxed, and not subject to any foreign Power, shall be deemed citizens of the United States." (Cong. Globe, 1st sess., 39th Cong., p.527)

The understanding of the Congress as to the meaning of the phrase as it appears in the Constitution was expressed by Mr. Trumbull: "It is a constitutional term used by the men who made the Constitution itself to designate.... a class of persons who were not a part of our population. (Ibid., p.572)

It is not surprising, then, to find the following statement in a report of the Judiciary Committee to the Senate of the United States on the 14th of December, 1870, in obedience to an instruction to inquire as to the effect of the Fourteenth Amendment upon the treaties which the United States had with various Indian tribes of the country:

"During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause 'three-fifths of all other persons' is wholly omitted; but the clause 'excluding the Indians not taxed' is retained.

"The inference is irresistible that the amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. They were excluded by the original constitution, and in the same terms are excluded by the amendment from the constituent body, the people."

"The exclusion of the Indians from the constituent body, the people, was reflected too in their exclusion from the operation of both State and Federal tax laws. As at the time of the adoption of the Constitution these Indians were not subject to taxation, so too were they not subject to taxation at the time of the adoption of the Fourteenth Amendment. This attribute of their status remained the same and it was retained as descriptive of a status which likewise had remained the same."

During the reconstruction debates over the 14th Amendment, the Senate (39th Cong. 1st Sess. (May 29-30, 1866)) had addressed House Joint Resolution No. 127. This was the resolution that introduced the proposed language to be included in the First and Second sections of the amendment. Members of the Senate debated whether or not the provisions of the 14th amendment should be extended to the "Indians not taxed" or "wild Indians" or "Indians remaining in tribal relations." The debate was upon issue as to whether or not the language "excluding Indians not taxed" should be in both sections of the amendment. However, what was not disputed was the fact that the "Indians" were not to be made "citizens of the United States of America."

In the first section, it was provided, the Indians were excluded by the wording of "subject to the jurisdiction thereof." Mr. Trumbull, Chairman of the Committee on the Judiciary, stated this point in the debates, as follows: ..."The provision is, that "all persons born in the United States, and subject to the jurisdiction thereof." Now, does the Senator from Wisconsin pretend to say that the Navajoe Indians are subject to the complete jurisdiction of the United States? What do we mean by "subject to the jurisdiction of the United States? Not owing allegience to anybody else. That is what it means. Can you sue a Navajoe Indian in Court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them...." (39th Cong. 1st Sess. (May 29-30, 1866))

Mr. Howard, Senator from Michigan, stated that "...Certainly, Gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction. That question has only since been adjudicated, so far as the usage of the Government is concerned. The Government of the United States have always regarded and treated the Indian tribes within our limits as Foreign Powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned, for in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with the Indian Tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes, the same character in which they have been recognized ever since the discovery of the continent and its occupation by civilized men; the same light in the Indians were viewed and treated by Great Britain from the earliest commencement of the settlement of the continent. (39th Cong. 1st Sess. (May 29-30, 1866))

Mr. Williams pointed out in the debate his observations, as follows: "I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States. But I am satisfied that, giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. The first and second sections of this proposed amendment are to be taken together, are to be construed together, and the meaning of the word "citizens" as employed in both sections, is to be determined from the manner in which that word is used in both of those sections. (39th Cong. 1st Sess. (May 29-30, 1866))

Now, can any reasonable man conclude that the word "citizens" there applies to Indians not taxed, or includes Indians not taxed, when they are expressly excluded from the basis of representation and cannot even be taken into the enumeration of persons upon whom representation is to be based? I think it is pretty clear, when you put the first and second sections together, that Indians not taxed are excluded from the term "citizens;" because it cannot be supposed for one moment that the term "citizens," as employed in these two sections, is intended to apply to Indians who are not even counted under any circumstances as a part of the basis of representation. I therefore think that the amendment of the Senator from Wisconsin is clearly unnecessary. I do not believe that "Indians not taxed" are included, and I understand that to be descriptive of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States." (39th Cong. 1st Sess. (May 29-30, 1866))

The Internal Revenue Service argues that the 1924 Citizenship Act authorizes taxing jurisdiction. If this is true, then this Act does so very ambiguously. In most cases of legislation, the act must be specific and clear and not ambiguously worded. But, in accordance to the IRS - as supported by the Department of Justice - this is not so. They take ambiguous laws, and perhaps unconstitutional laws, and apply the same to Indian country at will. In Indian case history, the courts usually require showing that the intent to apply the law to Indian country was clearly intended by the Congress. But, in the case of the Tax Courts, this is not the rule. The tax court and its "court officials" - the IRS Attorneys - will continue to apply ambiguous taxing authority to Indian Country, until such time the tribal governments are able to unite and force Judicial control to be used and a review of the constitutionality of the Indian Citizenship Act fully addressed by the U.S. Supreme Court or Congress assembled.

A CLOSER LOOK AT THE INDIAN CITIZENSHIP ACT

We must understand the reasons for the passage of the 1924 Indian Citizenship Act. But, first, let us look at the wording of this enactment, as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." Approved, June 2, 1924.

Where in this enactment does it say that the Internal Revenue Code shall be specifically applied to the land, resources, and incomes of Indian people...NOWHERE DOES IT SAY THIS! Reread all that follows the word "Provided." This clearly means that this Act was not to disrupt the protections reserved by or secured to the Indian people. And yet, the IRS allegedly is able to read that the whole tax code of the United States was impliedly applied to all of Indian Country. We claim that this is false and not the true intention of the law, as passed. In fact, on the very day that the "citizenship" was granted to the Indian people, the U.S. Congress was addressing the "Revenue Act of 1924": and, if the real reason was to apply tax laws to Indian Country, then this revenue bill would have been the logical location to enact such legislative authorization for the Internal Revenue Service.

There are other historical arguments that hold Indians were not to be taxed. As early as 1798 the Federal Government had imposed a direct tax upon real estate and slaves. Act of July 14, 1798, (1 Stat. 597). "In the summer of 1813 a direct tax was again assessed on real estate and slaves and Congress laid duties on carriages, a duty on refined sugar, a license tax upon distillers of spirituous liquors, stamp duties, an auction tax, and license tax upon retailers of wines and spirituous liquors," (Dewey, Financial History of the United States, page 139). By 1862 so many internal revenue taxes were being laid by the Federal Government that one writer concisely described the revenue measure of that year as follows:

> "Wherever you find an article, a product, a trade, a profession, or a source of income, tax it." (Well Practical Economics, New York, 1885)

In 1861 the first Federal income tax was authorized to be levied "upon the annual income of every person residing in the United States,...derived...from any...source whatever." Act of August 5, 1861 (12 State. 292, 309). The tax was increased in 1862 and in 1865, decreased in 1867 and finally abolished in 1872" (Dewey, Financial History of the United States, page 305.)

The special significance is that in no instance were any of these numerous taxes applied to Indians living in their separate tribal communities, even though, as in the case of the income tax, it was by its provisions intended to apply to "every person residing in the United States." The reason for the non-application of such a tax to Indians was the same as the reason for the non-application of all laws of general application to Indians. They were considered a people separate from the community of people of the United States; and thus, it was not to be inferred, in the absence of clear and unambiguous language to the contrary, that Congress intended to subject them to a law which by its terms applied to every person residing in the United States. Elk v. Wilkins, 112 U.S. 94.

In fact, the reason the Indian Citizenship Act was enacted had nothing to do with taxation of Indians. The intent was to secure First Amendment Rights of the U.S. Constitution for American Indians. (The Hopi by Harry James, 1974) This was because the Commissioner of Indian Affairs, Charles Burke, had drafted, implemented, and began the enforcement of the "Religious Crimes Code," from 1921 to 1924. This code had the specific aim of eliminating American Indian Religions. When the Commissioner began to have Native Americans imprisoned, the attention of Indian support groups in California were aroused. The foremost was the Indian Welfare League; the others were the National Association to Help the Indian, and the Indian Defense Association of Northern California.

It was the brainstorm of a member of the Indian Welfare League that American Indians should be made "citizens." This person was Ida May Adams, a Los Angeles Lawyer. She believed Indian people would be given the First Amendment Religious Freedom guarantees, if they were citizens. The Act was not intended to affect any other part of the Indian's life or property holdings and rights. The American Indian Religious Freedom Act was passed in 1978, 54 years after the Citizenship Act.

We do not believe the 1924 Indian Citizenship Act expanded the powers of the Internal Revenue Service. The IRS should not be inside Indian Country and taxing. The United States government should not continue to violate their own constitution, and the Federal courts should not continue to ignore such violations--under the disguise that it is a political question between the Indian Tribes and the Politicians. The real question is, what is the process for the U.S. Congress to apply the taxing and representation powers over Indian Country. We argue that it is specifically worded within the Fifth Article of the Constitution...**the amendment process.**

The U.S. Constitution was amended twenty-three times, and five other amendments were proposed, but never ratified, by the required three-fourths of the States. Amendment Fourteen was specifically added to address the freed negro slaves, the Chinese, and the people from "India". To prove that it was not intended to be applied to the American aboriginal Indians, the wording "Excluding Indians Not Taxed" was retained in the second section of the amendment and clearly by the words "subject to the jurisdiction thereof" in the first section. Article I of the Constitution was further amended to provide for the suffrage of American women, as ratified in 1920. It is significant to point out that the amendment process is applicable to Congress assembled and its dealings with American Indians. They can continue to argue that their actions are justified as "political questions", in reality, and sooner or later, they will have to account for having weakened the constitutional value of their mandated duties and powers.

It is the Senators and Representatives that will have to respond to the questions of taxing power raised by the Internal Revenue Service. Congress and the Courts are the primary targets of Felix Cohens' quote:

> "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of the American Indian, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith..."
> (1953)

If the United States Congress, fails to correct the errors of the Internal Revenue Service, then they are only further perpetuating the neglect of the mandates of the constitution. America's form of constitutional democracy is precariously fragile. If the President, as Chief Executive, cannot or will not issue an Executive Order to the Internal Revenue Service, directing their withdrawal from inside the borders of Indian Country, then it will be the job of Congress assembled to do so through an amendment, resolution, or bill.

BUREAUCRATIC ZEAL CONTINUES TO ABROGATE TREATIES

The IRS is implementing its own agenda that includes taxing all treaty rights that guarantee to the American Indian people their control and enjoyment of land resources reserved by treaties for future generations. Career officials and career staff counsels are developing their own policy on Indian Country. Such agendas are contrary to the President's 1983 Indian Policy. However, the reason such career personalities are able to implement their own agendas was typified by President Harry S. Truman, in 1948, as follows:

> "The difficulty with many career officials in the government is that they regard themselves as the men who really make policy and run the government. They look upon elected officials as just temporary occupants. Every president in our history has been faced with this problem: how to prevent career men from circumventing presidential policy. Too often career men seek to impose their own views instead of carrying out the established policy of the Administration. Sometimes they achieve this by influencing the key men appointed by the President to put his policies into operation..."

We can see that the career officials of the Internal Revenue Service have been able to exercise this very type of influence over the President's men. In this case, the Secretary of Treasury and the Attorney General have both officially approved the IRS agenda. Both have signed onto legal opinions that hold that to apply the taxes is the "sounder view of the law." Even though the President has declared that it is his policy to NOT ABROGATE TREATIES MADE WITH THE INDIAN TRIBES, and even though the U.S. Constitution make these treaties the supreme law of the land, and even though the U.S. Constitution still provides "Excluding Indians not taxed," the IRS was able to convince these appointees that their agenda is valid. One check on such zealous use of this ambiguous taxing power, and its development in accordance to the IRS agenda, in lieu of Congress, should have been within the Federal courts.

IS JUDICIAL SAYSO OR THE CONSTITUTION THE SUPREME LAW OF THE LAND

Oliver Ellsworth said in the Connecticut Convention, January 7, 1788: "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure the impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so." (David Hutchison, The Foundation of the Constitution, p. 272) "A careful study shows that the members understood the Federal judiciary was to declare both state and United States laws void. All these men held firmly to the idea that the Constitution required the Federal courts to declare state and national laws void, if they contravened the Constitution of the United States. These were the men who framed the Constitution, and they all expected the Federal courts to exercise judicial control over legislation." (Ibid., p. 272)

President Franklin D. Roosevelt remarked upon this subject in his radio address on March 9, 1937, as follows:

> "I want -- as all Americans want -- an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written--that will refuse to amend the Constitution by the arbitrary exercise of judicial power -- amendment by judicial sayso"

Now, we hold that for any of the Federal courts, entrusted by and empowered by the authority of the United States, that refuse to read the Constitution as written, and that refuse to acknowledge that the U.S. Constitution has never been amended as to the "Excluding Indians not taxed" language, is doing just what President Roosevelt feared and disliked: "amendment by judicial sayso ."

Since passage of the "Indian Citizenship Act", the Internal Revenue Service has been prosecuting American Indians in Tax Courts as if the Act itself was a proper amendment to the Constitution, Article V notwithstanding. Since 1924, this citizenship question has surfaced time and time again in the Tax Courts, with rulings always holding that since Indians are citizens, they must pay the federal income taxes. It is a duty of the Court to read the Constitution as it is presently written wherein we find the words "excluding Indians not taxed."

This obligation is well versed by Justice Cooley, in his classic commentaries on the Constitution: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have changed as perhaps to make a different rule in the case seem desirable. A principle share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion... Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people themselves, to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it. The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. (Cooley's Constitutional Limitations, 68-69 (6th ed. 1890)).

RECEIVED NOV 24 1987

Central Lutheran
Church of the Holy Trinity
1710 Eleventh Avenue • Seattle, Washington 98122 • (206) 322-7500/324-8529 • Jonathan C. Nelson, Pastor

November 19th, 1987

The Honorable Larry Kinley
Lummi Business Council
2616 Kwina Road
Bellingham, WA 98225

Dear Mr. Kinley:

On Saturday, November 21st, a public delcaration from the leaders of nine major Christian denominations and traditions in the State of Washington was delivered to Jewell Praying Wolf James of the Lummi Indian community. It is dated Thanksgiving Day 1987 and will be read in 1800 congregations across our State and Alaska in the days ahead. As a member of the Native American Task Force of the Church Council of Greater Seattle, I am enclosing a copy of the document that we ask be shared with members of your tribal council and traditional spiritual leaders in your community.

We have made a pledge to stand behind the commitments made and wish God's blessing on your efforts to renew and reclaim the valuable spiritual heritage which rests with your elders and ancient teachings. Included with this expression is a gift of integrity ($1000) to the Native American Rights Fund in Boulder, Colorado.

If we can be of any assistance in the weeks and months ahead, please do not hesitate to call upon us. You can contact me at my offices (address above), or Dr. Wm. Cate of the Church Council of Greater Seattle, or any of the Bishops and denominational leaders (see addresses attached) listed as signers of the statement.

Sincerely,

Jonathan C. Nelson

August 24, 1987

SEATTLE BISHOPS/DENOMINATIONAL EXECUTIVES

The Rev. Loren E. Arnett, Executive Minister
Washington Association of Churches
4759 15th Ave. NE
Seattle, WA 98105
(206) 525-1988

The Rev. Thomas L. Blevins, Bishop
Pacific Northwest Synod - Lutheran Church in America
5519 Phinney Ave. North
Seattle, WA 98103
(206) 783-9292

The Rev. Dr. Robert Bradford, Executive Minister
American Baptist Churches of the Northwest
321 First Avenue West
Seattle, WA 98119
(206) 285-1034

The Rev. Robert Clarke Brock, Regional Minister
Northwest Regional Christian Church (Disciples of Christ)
6558 35th Ave. SW
Seattle, WA 98126
(206) 938-1008

The Rev. Dr. William B. Cate, President-Director
Church Council of Greater Seattle
4759 15th Ave. NE
Seattle, WA 98105
(206) 525-1213

The Right Rev. Robert H. Cochrane, Bishop
Episcopal Diocese of Olympia
1551 Tenth Avenue East
(Note: mailing address / P.O. Box 12126)
Seattle, WA 98102
(206) 325-4200

The Rev. Ms. Elizabeth Knott, Synod Executive
Presbyterian Church, Synod Alaska-Northwest
720 Seneca Street
Seattle, WA 98101
(206) 623-4073

The Rev. W. James Halfaker, Conference Minister
Washington North Idaho Conference - United Church of Christ
720 14th Avenue East
Seattle, WA 98112
(206) 323-8383

65 The Most Rev. Raymond G. Hunthausen, Archbishop
The Most Rev. Thomas J. Murphy, Coadjutor Archbishop
Roman Catholic Archdiocese of Seattle
910 Marion Street
Seattle, WA 98104
(206) 382-4888

67) The Rev. Lowell Knutson, Bishop
North Pacific District American Lutheran Church
766-B John Street
Seattle, WA 98109
(206) 624-0093

68 The Rev. Dr. Melvin G. Talbert, Bishop
United Methodist Church - Pacific Northwest Conference
2112 Third Avenue, Suite 301
Seattle, WA 98121
(206) 728-7674

The Rev. William Mitchell, Director
Christian Methodist Episcopal Church, Alaska/Pacific Conference
807 NE 145th Avenue
Vancouver, WA 98664
(206) 892-1733

EASTERN WASHINGTON DENOMINATIONAL EXECUTIVES

The Rev. Janice Eller, Executive
Oregon-Washington District Church of the Brethren
12727 SE Market Street
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The Most Rev. William S. Skylstad, Bishop
Roman Catholic Diocese of Yakima
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Yakima, WA 98908-3493
(509) 248-6857

The Right Rev. Leigh Wallace, Bishop
Episcopal Diocese of Spokane
E. 245 13th
Spokane, WA 99202
(509) 624-3191

The Most Rev. Lawrence Welsh, Bishop
Roman Catholic Diocese of Spokane
P.O. Box 1453
Spokane, WA 99210
(509) 456-7100

A PUBLIC DECLARATION

TO THE TRIBAL COUNCILS AND TRADITIONAL SPIRITUAL LEADERS
OF THE INDIAN AND ESKIMO PEOPLES OF THE PACIFIC NORTHWEST
In care of Jewell Praying Wolf James, Lummi

Seattle, Washington
November 21, 1987

Dear Brothers and Sisters,

This is a formal apology on behalf of our churches for their long-standing participation in the destruction of traditional Native American spiritual practices. We call upon our people for recognition of and respect for your traditional ways of life and for protection of your sacred places and ceremonial objects. We have frequently been unconscious and insensitive and have not come to your aid when you have been victimized by unjust Federal policies and practices. In many other circumstances we reflected the rampant racism and prejudice of the dominant culture with which we too willingly identified. During the 200th Anniversary year of the United States Constitution we, as leaders of our churches in the Pacific Northwest, extend our apology. We ask for your forgiveness and blessing.

As the Creator continues to renew the earth, the plants, the animals and all living things, we call upon the people of our denominations and fellowships to a commitment of mutual support in your efforts to reclaim and protect the legacy of your own traditional spiritual teachings. To that end we pledge our support and assistance in upholding the American Religious Freedom Act (P.L. 95-134, 1978) and within that legal precedent affirm the following:

1) The rights of the Native Peoples to practice and participate in traditional ceremonies and rituals with the same protection offered all religions under the Constitution.
2) Access to and protection of sacred sites and public lands for ceremonial purposes.
3) The use of religious symbols (feathers, tobacco, sweet grass, bones, etc.) for use in traditional ceremonies and rituals.

The spiritual power of the land and the ancient wisdom of your indigenous religions can be, we believe, great gifts to the Christian churches. We offer our commitment to support you in the righting of previous wrongs: To protect your peoples' efforts to enhance Native spiritual teachings; to encourage the members of our churches to stand in solidarity with you on these important religious issues; to provide advocacy and mediation, when appropriate, for ongoing negotiations with State agencies and Federal officials regarding these matters.

May the promises of this day go on public record with all the congregations of our communions and be communicated to the Native American Peoples of the Pacific Northwest. May the God of Abraham and Sarah, and the Spirit who lives in both the cedar and Salmon People be honored and celebrated.

Sincerely,

Thomas L. Blevins
The Rev. Thomas L. Blevins, Bishop
Pacific Northwest Synod –
Lutheran Church in America

The Rev. Dr. Robert Bradford,
Executive Minister
American Baptist Churches of the Northwest

Robert Clarke Brock
The Rev. Robert Brock
N.W. Regional Christian Church

Robert H. Cochrane
The Right Rev. Robert H. Cochrane,
Bishop, Episcopal Diocese of Olympia

W. James Halfaker
The Rev. W. James Halfaker
Conference Minister
Washington North Idaho Conference
United Church of Christ

R. G. Hunthausen
The Most Rev. Raymond G. Hunthausen
Archbishop of Seattle
Roman Catholic Archdiocese of Seattle

Elizabeth B. Knott
The Rev. Elizabeth Knott, Synod Executive
Presbyterian Church
Synod Alaska-Northwest

Lowell E Knutson
The Rev. Lowell Knutson, Bishop
North Pacific District
American Lutheran Church

Thomas J Murphy
The Most Rev. Thomas Murphy
Coadjutor Archbishop
Roman Catholic Archdiocese of Seattle

Melvin G. Talbert
The Rev. Melvin G. Talbert, Bishop
United Methodist Church –
Pacific Northwest Conference

STATEMENT OF ROGER A. JOURDAIN

CHAIRMAN
RED LAKE BAND OF CHIPPEWA INDIANS

CO-CHAIRMAN
THE ALLIANCE OF AMERICAN INDIAN LEADERS
AND THE INDIAN RIGHTS ASSOCIATION

TESTIMONY IN SUPPORT OF SENATE CONCURRENT RESOLUTION 76
BEFORE THE U.S. SENATE SELECT COMMITTEE ON INDIAN AFFAIRS
DECEMBER 2, 1987

I. Introductory Remarks

Good morning, Mr. Chairman and members of the Committee. My name is Roger Jourdain, and I am the duly elected Chairman of the Red Lake Band of Chippewa Indians, a position I have held for some 28 years. I am also Co-Chairman of the Alliance of American Indian Leaders and the Indian Rights Association.

A. Historical Occasion of Hearing on S.Con.Res.76

I am delighted by the occasion of this hearing. We have worked hard, together with you, to see this day.

As you and members of your Committee know, Mr. Chairman, the Alliance views S.Con.Res. 76 as an important first step toward fundamental change. The Resolution embodies sacred principles. It reminds us all of where we have been and where we must go. It is a conceptual vehicle that will help to set in motion a process to restore the nation-to-nation status between Indian Tribes and the United States, which is the founding goal of the Alliance.

Today's hearing could well be seen by future generations as marking the restoration of relations between Indian Tribes and the Congress -- one that is distinguished among the world's nations by the good faith, integrity and basic justice toward Indian people that are enshrined in the U.S. Constitution and that are the permanent obligations and duties of the United States.

For these reasons, we wish to commend and thank you, Mr. Chairman, and the other members of this Committee and the Senate who have co-sponsored this Resolution. We hope this Committee will see fit to hold field hearings on this Resolution so that the issues can be raised more dramatically at the reservation level.

B. New Special Subcommittee on Investigations

We also want to commend you for the recent initiative this Committee has taken to establish a Special Subcommittee on

Investigations. I believe the Subcommittee is one of the first positive outcomes of Senate consideration of S.Con.Res. 76. Its mission embodies and implements the principles acknowledged and reaffirmed in S.Con.Res. 76 -- that the United States must exercise the utmost good faith in upholding its obligations to Indian Tribes.

1. Support For Subcommittee's Work

I offer to assist the Subcommittee in whatever ways I can. We eagerly look forward to cooperating with its investigators. The Subcommittee's success is absolutely vital to every Indian Tribe I know of, and certainly to my own, because the very lives of our Indian people have become bedeviled by a scandalous bureaucracy. We welcome the additional energies that the Subcommittee will bring to rooting out the bureaucratic corruption and colonialism that have robbed our reservations of our capacity to prosper.

2. Significant Involvement of Tribes by Subcommittee Members

It seems to me that the Subcommittee's work can be done most effectively only if tribal leaders are significantly involved in the identification and analysis of the problems that are the focus of the investigation. To ensure significant tribal involvement, we urge you to set up mechanisms which do two things: (1) guarantee that timely information gets to Indian Tribes about the decisions confronting the Subcommittee and the directions it intends to take; and (2) guarantee that Indian Tribes may provide timely direction and information to the Subcommittee to guide and aid its investigation and problem solving.

II. The Alliance of American Indian Leaders

A. Origins

In the Spring of 1986, the Indian Rights Association (IRA) began planning efforts to ensure that the celebration of the bicentennial of the U.S. Constitution considers both the historical and contemporary relationships of Indian Tribes with the United States. The IRA circulated a survey questionnaire to all Tribes and Alaska Native villages and 1,300 social scientists and law faculty.

In response to the IRA's questionnaire and the sharply deteriorating relationships between the United States and Indian Tribes, Wendell Chino, as President of the Mescalero Apache Nation, and I, as Chairman of the Red Lake Band of Chippewa Indians, called a meeting of 10 Tribal Chairmen and their associates for December 15-17, 1986 in Kansas City. The Chairmen attending were Joe DeLaCruz (Quinault Nation), Larry Kinley (Lummi Business Council), Joe American Horse (Oglala Sioux Nation), Earl Old Person (Blackfeet Nation), Richard Real Bird (Crow Tribe), Ernest House (Ute Mountain Tribe), Jack Thorpe (Sac & Fox Tribe of Oklahoma), and Arthur Gahbow

(Mille Lacs Band of Chippewa Indians). Together, we formed an alliance with the Indian Rights Association. We called it the Alliance of American Indian Leaders and the Indian Rights Association.

B. Nature of the Alliance -- Not an Organization

From its very beginning, we decided the Alliance would not be an organization. The Alliance itself would have no staff and no budget. Alliance participants simply would represent their respective Tribes or the Indian Rights Association. The Alliance membership would remain open to all Indian leaders.

C. Organizing Purposes

We formed the Alliance to secure the right of Indian Tribes to exist as Tribes in perpetuity, to freely exercise tribal sovereignty, to seek the elimination of arbitrary, unilateral decision-making by the Federal Government in Indian affairs, to gain effective tribal access to the constitutional political system of the United States, and to affirm that Tribes should have an effective voice, as governments, in all matters affecting their affairs.

D. Goal -- Restore Nation-to-Nation Relationships

We are convinced that the only basis for real Indian self-determination is the full restoration of the unique, constitutionally recognized relationship between the United States and Indian Tribes. This nation-to-nation relationship must mean significant involvement by Indian Tribes, as governments, in the United States' political system and in the executive and legislative branch decision-making process relating to Indian affairs. While the Alliance does not seek full reinstatement of the treaty-making process, it seeks to eliminate arbitrary, unilateral decision making by the Federal Government in Indian affairs, and to gain effective access to the United States' constitutional system.

E. Objectives

The Alliance's founding tribal leaders initially resolved to:

(1) Seek introduction and hearings on a joint congressional resolution reaffirming the constitutionally recognized nation-to-nation relationship of the United States with Indian Tribes;

(2) Review, analyze and produce a study of the constitutional relationships between Indian Tribes and the United States;

(3) Set in motion a process to restore nation-to-nation status between Indian Tribes and the United States; and

(4) Review, analyze and produce a study of different Tribes' exercise of self-government, of international perspectives, and of traditional cultural perceptions of tribal self-government.

F. Alliance Role in Creation of S.Con.Res. 76

On February 18, 1987 Alliance participants met with Senator Inouye, Chairman of this Select Committee, to brief him on our plan of action and seek his assistance. The Senator agreed to help and on February 19, 1987 he promised the Alliance he would introduce the congressional resolution sought by the Alliance which is the subject of today's hearing. Alliance leaders periodically reviewed and offered revisions to several Select Committee staff drafts of the resolution.

On September 17, 1987 Senator Inouye held a press conference and participated in a traditional pipe ceremony conducted by my Tribe, the Red Lake Band of Chippewa Indians, in honor of his Senate introduction of the resolution sought by the Alliance of American Indian Leaders and the Indian Rights Association.

G. Other Alliance Activities in Its First Year

We have devoted significant energies to public education, because it is critical to the integrity of the fundamental institutional changes we seek that the unique and historical relationships between the United States and Indian Tribes are known by U.S. government policy makers, by Indian Tribes, and by the general public.

To establish a basis for our work, we asked the Native American Rights Fund (NARF) to prepare a fundamental legal and historical analysis of the status of the Tribes as perceived by the framers of the Constitution. As a result, NARF's Arlinda Locklear produced a helpful paper entitled "Indian Tribes and the United States: The Historic Relationship."

In October, 1987, the Alliance and the Indian Rights Association sponsored an international symposium in Philadelphia. Its focus was "In Search of a More Perfect Union: American Indian Tribes and the United States Constitution." During this three-day seminar, distinguished Indian leaders, legal scholars, knowledgeable historians, and social scientists discussed the fundamental aspects of tribal relationships with the United States. The Alliance plans to transcribe the audio record of the symposium and produce educational materials for the general public.

H. Future Alliance Activities

We intend to work closely with this Committee and its counterpart in the House of Representatives to secure passage of S.Con.Res. 76.

In 1988, we hope to begin a major, three-year project that will directly involve all tribal leaders in reviewing existing federal systems and provide opportunities for tribal leadership dialogue, debate, and development of recommendations for future federal administration of Indian affairs. This project will identify tribal concerns and views on what directions future Indian policy should take. With this foundation, we intend to facilitate a process by which the Tribes themselves mold and propose a restructured federal administrative system directly responsive to tribal policy views and needs.

III. History of Relations Between the United States and Indian Tribes

A. Introduction

From the very beginning of the dealings between Europeans and Indian Tribes, the relationship has been a political one. The European nations agreed that the sovereign powers of Tribes were to be respected. Peace pacts were struck, international alliances were made, wars were waged, and commerce flourished. The European nations agreed that any acquisition of Indian lands or resources would first require consent of the Indian Tribes affected. This same view was adopted by the framers of the United States Constitution -- the sovereignty of Indian Tribes was to be respected. Contrary to popular misconceptions, relationships between the United States and Indian Tribes were marked by consent, not conquest.

Under the U.S. Constitution, Congress was granted no control over Indian Tribes other than in the narrow area of regulating commerce, unless otherwise agreed upon by treaty. Indian Tribes' powers of self-government were not derived from the U.S. Constitution. Instead, these powers pre-dated the Constitution. Unfortunately, judicial interpretation and construction of the law in this area has shifted dramatically over the years. One particularly noxious swing during the past 100 years involved the creation by the U.S. Supreme Court of the judicial doctrine of plenary power. For more detailed treatment of that subject, I am submitting as an appendix to my written testimony a legal analysis of the "Judicial Invention of the Plenary Doctrine" which my Tribe commissioned our counsel to prepare. I request that you include that memorandum as part of the record.

B. Shared Philosophy of a Democratic Republic

Other witnesses at this hearing will describe in detail the conceptual and idealogical debt the United States owes to the democratic ideas and systems of government employed by Indian Tribes long before the United States was established. I am proud of the Indian philosophical contributions to the United States' understandings of law, democracy and justice. Together, the United States and Indian Tribes have found compelling common ground in our adherence to the belief that the best government is that which tries always to be a truly democratic republic, one that upholds the value of each of its individual citizens and reflects, through democratic institutions, the will of the people.

C. Treaty Agreements

A series of statutes, numerous executive agreements, and the more than 370 treaties between the United States and Indian Tribes form the present-day legal foundation of their unique relationships and obligations. These agreements between Indian Tribes and the United States concerned the exchange of resources and their mutual need for protection and peace. The United States principally sought land resources. In exchange for their land, Indian Tribes sought security guarantees for their remaining property, and guarantees of financial resources and services necessary for their preservation, protection, and enhancement. In other words, the treaties were like classic contracts between parties, in which each party aimed to cooperatively serve its self-interest. The difference is that the United States' contract obligation is perpetually due.

D. Unilateral Plenary Doctrine

1. 1871 Statute Ending Treaty-Making

The treaty-making era was unilaterally terminated by the United States in a rider attached by the House of Representatives to the Indian Appropriation Act of 1871. Although the rider did not impair or invalidate agreements made prior to 1871, the Congress made it clear that no new treaties were to be executed between the United States and Indian Tribes. The political motivation for this rider arose from the exclusion of the House of Representatives from the process of treaty ratification, a role constitutionally reserved for the Senate alone.

As a result of this ban on treaty-making, the United States was without any mechanism to bargain with Indian Tribes for further resource exchanges. The judicial branch stepped into the void by creating the plenary doctrine: the United States would deal with Indian Tribes by unilaterally imposing its will through statute. This turned the historical process of dealing with Indian Tribes on its head, based upon a new rationale of conquest not consent.

The effect of this judicial invention was to free Congress from the limitations of international law as well as that of the U.S. Constitution. Rather than negotiate, Congress could simply legislate. The Supreme Court provided Congress with the unfettered power to govern Indian Tribes, relying on the circular reasoning that Congress had the power to declare that it had the power to unilaterally govern Indian Tribes because Congress had the power to unilaterally govern Indian Tribes.

At the turn of this century, the judiciary went even further and declared that Congress's plenary power over Indian Tribes was a political question and thus not even subject to judicial review. The law has since changed as a result of subsequent court decisions which have narrowed the breadth of the Supreme Court's earlier plenary power and political question doctrines. However, the last vestiges of those doctrines continue to plague Indian Tribes.

2. Termination and Assimilation Philosophy

A growing movement arose early in this century to unilaterally abrogate treaties, terminate Indian Tribes, and assimilate Indian people into the mainstream American culture. It reflected a devious effort to extricate the United States from its treaty and statutory obligations toward Indian Tribes. This movement peaked in 1954 with legislation that took civil and criminal jurisdiction from many Tribes, eliminated many Indian statutes and programs, and in general proposed to withdraw the United States from the entire field of Indian affairs. In short, the "uncivilized" Indian people were supposed to be thrown wholesale into "civilized" society, their cultures devastated, their governments destroyed and their property looted. While Congress retreated from full implementation of these policies, some measures were adopted. We now know that the ethnocentrism and racism that drove these policies were rooted in the same ill-founded thinking that created the plenary doctrine.

3. The Newest Theft of Indian Sovereignty -- Implicit Divestiture

Before 1978, the United States Supreme Court steadfastly held to the view that Indian Tribes had sovereign authority over their reservations unless Congress expressly took it away. But in 1978 the Court invented a new tool to strip unilaterally even more of the Tribes' sovereign powers -- implicit divestiture. The Court opined that Tribes possess only that sovereignty not withdrawn "by treaty or statute, or *by implication as a necessary result of their dependent status*." *United States v. Wheeler*, 435 U.S. 313 at 323 (1978) (emphasis added). The practical effect of this holding was to give to the judicial branch quasi-plenary power over Tribes. Implicit judicial divestiture, like congressional plenary power, is a policy built upon an illogical legal theory and a distorted view of history.

IV. Current Crisis

A. Trust Mismanagement

Anyone who has read the recently published Arizona Republic investigatory articles or is even remotely familiar with everyday life on an Indian reservation can tell you -- the United States governmental agencies have, to put it politely, thoroughly bungled their task. Incompetent and dishonest government agents, as well as interests completely adverse to Indian Tribes, have sullied the sacred trust obligations of the United States toward Indian Tribes. It represents a national disgrace.

1. Looting of Indian Resources

The significant natural resources of Indian Tribes have been grossly mismanaged by the United States government (for an example, see my discussion below of my Tribe's forestry and sawmill operations), resulting in a serious depletion and near total loss of valuable Indian assets. Leases of Indian lands and resources have been executed by the United States as trustee for far-below market compensation. The bloated bureaucracy that pretends to carry out the trust responsibility through protection and provision of resources is rife with examples of fraud, corruption, malfeasance and misappropriation.

2. Error-Prone Decision-making Process

Most of the United States' bureaucratic involvement in Indian affairs is characterized by an ethnocentric, racist attitude of bureaucrats who conduct themselves as if they were taking care of "their" child-like, incompetent Indians. This leads to all sorts of disasters. Not only is this attitude offensive to have to deal with, I have found as Tribal Chairman for the past 28 years that it breeds a reckless arrogance among bureaucrats that leads them to habitually keep key information and decisions secret from Indian Tribes under the cover that the government agents are looking out for our best interests.

I do not think it is at all arrogant on my part to claim that we at the reservations know best about what our priorities are and what must be done to accomplish them. That is exactly what we tribal leaders are elected by our people to do. We know our people; we know our needs; we have demonstrated our ability to competitively run our economic enterprises; and we have developed rather sophisticated governmental and social service delivery systems. We have the knowledge. We have the know-how. What we need is the United States government to do its part of the bargain, not our part. My basic point is this -- until relations with Indian Tribes are restored to a government-to-government basis, the federal bureaucracy is going to find itself repeating the failures of the past, which failures come at a great expense to the trust responsibility and to the United States Treasury.

3. Bureaucratic Resistance to Self-Determination Policy and Practice

At Red Lake we have repeatedly seen evidence of a natural conflict of interest that is the very life-blood of the bureaucracy -- BIA employees are personally threatened by successful tribal contracting efforts because that imperils their employment and their power. If we do a good job of administering some functions formerly run by the bureaucrats, those same bureaucrats are fearful that the remaining programs they administer will be contracted out to us and that they will be laid off or their personal authority cut back.

The contract officers are typically the biggest problem. They flagrantly ignore the BIA's own rules and regulations on the review of contracting requests, proposals, negotiations and responses to tribes. Instead, in an apparent attempt to ensure that we either cannot perform the contract or that our performance is inferior, these officers seem to sandbag our contracts whenever they can.

Program officials also hide information from us about our Tribe, our programs, and our resources. They irregularly respond to our requests, typically with incomplete or inaccurate details. They usually refuse to consult or inform us in advance of decisions that affect us. And when they do, the opportunities for input are really sham opportunities, because our choices are limited or the decisions have already been made.

The underlying reason for program officials' preference for secrecy and limited input is clear to us -- if we knew more about these programs we probably would present an unavoidable proposal to contract them out from under the bureaucrats' control.

B. Examples from Red Lake Experience

1. Successful Resistance to Public Law 280 and Allotment Acts -- Enormous Positive Benefits to Tribe

Red Lake strongly resisted the efforts to cede jurisdictional authority, both civil and criminal, to the state. Significant pressures were brought to bear against the Tribe. However, we were able to secure an exception from Pub. L. 83-280 so that our reservation remained, in the terminology of the time, a "closed" reservation.

Looking back now on that momentous time, we are grateful for the foresight we had. Had we not been excluded from Pub. L. 83-280, our people would very likely be scattered, our culture and ways decimated, and our tribal government diminished to a mere figurehead.

We were also able to avoid all loss of our precious land base under the various allotment acts. Again, we look back now and realize that only through ever-vigilant and strong tribal government were we able to resist the pressures to open our reservation to the allotment land grabbers.

This combination of an intact land base and inviolate jurisdictional authority is what we seek to preserve against all threats. It is not a new idea. It is simply the way things always were, until the more recent, unilateral encroachments by the United States Government under the code words of "plenary power" and "implicit divestiture".

2. United States' Sabotage of Red Lake's Economic Development and Well-being

a. 1916 Red Lake Forestry Act

One of our most appalling problems at Red Lake has been the gross mismanagement of our sawmill by the Bureau of Indian Affairs (hereinafter "BIA"). In 1916, Congress saw fit, without consulting the Red Lake Band, to authorize the BIA to build and operate a sawmill to benefit our Tribe. The BIA paid for the construction of the sawmill with our tribal timber receipts.

Although it found it difficult to do so, the Tribe actually lent the BIA sawmill operation $200,000 from our Docket 18A account in the 1960s in order to bail-out the sawmill from certain closure at the hands of BIA mismanagement. We did so on the basis of a BIA official promise to keep the mill in operation and at full employment. The BIA actively sought the loan of tribal funds to the BIA sawmill. Here we are, more than 20 years later, still asking for repayment and still being refused.

After decades of BIA mismanagement, the sawmill was forced to close in 1984. It had been the largest employer on our reservation. In the past 70 years, we suffered the loss of nearly all of our merchantable timber, unauthorized expenditures by bureaucrats of our trust funds, the nonpayment of stumpage, and a government refusal to repay a loan of $200,000 we made to them.

Since 1984, the mill has remained closed. The mill is now obsolete, our forest resources are depleted to the point of bankruptcy, and our work force is laid off. The BIA has failed to assist the Tribe in its concerted efforts to develop a modern forest products industry. The Red Lake Band has been forced to do what many Tribes regularly find they have to do -- we have filed suit against the BIA for its gross mismanagement of our timber industry in order to force the BIA to correct the problems and compensate the Tribe for its many losses.

The litigation drags on and on. Not only is the suit expensive to both the Tribe and the BIA, but the old mill remains closed and our people unemployed. Tribes are chronically offered only the painful, costly and slow option of a lawsuit -- the BIA seems incapable of resolving disputes in any fashion other than through coerced, and often grudging, compliance with a court order or judgment. This BIA intransigence is terribly frustrating and quite costly.

b. Wild Rice Project

One of our most pressing goals is to re-establish a viable economy on our reservation. Nearly 55% of our people are now unemployed. We have devoted considerable energies to exploring and developing new economic development projects. One such project with great promise is our wild rice business. Rice growing is actually an old, traditional activity on our reservation.

The Red Lake Reservation is located in one of the few regions in North America that is naturally well-suited for the production of wild rice. Fortunately for us, wild rice is becoming an increasingly popular food item throughout the United States and Europe. A recent survey of our land resource revealed that we have 40,000 acres that could produce wild rice, with the potential of annually producing a minimum of 8 million pounds of wild rice. There are now only a few large growers and producers of wild rice in North America. Red Lake has the unique potential to join the competition in its earliest stages as the market for wild rice begins to expand dramatically.

In 1984, the BIA cooperated with us in sponsoring a 200-acre pilot project. Season after season, the demonstration project has been a success. We have already expanded it to 400 acres. We recently commissioned a feasibility study, in cooperation with the University of Minnesota and wild rice experts, to develop a long-range plan for the expansion of our wild rice business. The result was a detailed plan for phased expansion of 500 acres per year for the next ten years and marketing the product under the Red Lake label.

The only thing stopping us from expanding the wild rice operation to our fullest potential is the scarcity of initial capitalization funds. As you know, the private capital market is nearly inaccessible to us.

What follows will demonstrate to you the incredible inability of the United States government to respond to tribal priorities and needs. We took our wild rice capitalization request to the United States Department of Agriculture (hereinafter "USDA") about one year ago. USDA officials expressed genuine interest in our enterprise but explained that USDA regulations prohibit USDA from assisting a tribally-owned enterprise of this type.

We then went to the BIA's Office of Trust Responsibilities and Economic Development and were told that its only Indian business development grant program requires an Indian Tribe to put up a 75% match of the BIA funding and that, in any event, these grants cannot exceed $250,000 per Tribe.

We went to the BIA's agriculture staff, but they told us that the only land/water development monies were already earmarked for irrigation systems and could not be used in rice paddy development.

Private banks refuse to even consider lending money to our enterprises unless we are willing to mortgage our trust lands -- something we are unable and absolutely unwilling to do.

Thus we went full circle and came up empty handed.

c. Bureaucratic Boondoggles and Delays

The federal bureaucracy is not in the business of identifying and assisting viable tribal ventures. Instead, the government's landscape of economic development projects looks like a ghost-town, littered with abandoned efforts and failed dreams, one of which is the BIA sawmill at Red Lake. Its bungling sabotages viable economic development on reservations everywhere.

The BIA has typically told us to go to the private sector whenever we have developed plans for an economic development project. When we have done so, the bureaucracy continues to dog us and kill the effort.

One recent example of this involved the Red Lake Band's plan to purchase land on which to locate a tribal enterprise. The success of the venture depended upon the BIA's completion of federal paperwork in a timely manner. We opened negotiations with the private interests and made a clear request to the BIA. After 18 months of waiting for the BIA to complete the work required by federal law and BIA regulations, the private sector dropped out because it couldn't afford to wait any longer. Not only did the BIA drag its feet, the realty personnel at the agency and area offices did not even know how to perform the most basic realty transfer functions. Throughout this process, the BIA repeatedly made promises that were broken and demanded repetitive paperwork from the Tribe.

3. Tribal Contracting Administration Thwarted

The administration of our governing body, the Red Lake Tribal Council, has become more sophisticated than, and technically superior to, both the agency and area BIA offices. All of our grants, contracts, payroll and enrollment records are computerized, while the BIA limps along in an obsolete manner using hand-kept records and many other inefficient, lackadaisical methods of administration that reflect more a critical lack of creative management skills than budgetary restraints. It is not unusual for BIA's "experts" to come to the Tribe seeking advice on contracts and grants management. The BIA cannot even seem to work up a capacity to maintain complete files on our grants and contracts, periodically coming to us for information they should already have.

a. Area Office Delays on New Contract Approval

The BIA has repeatedly violated its own regulations, failing to meet deadlines for review of applications to contract, failing to meet with the Tribe to discuss technical problems raised by the applications, and in one case, the area office failed even to review our application at all, sending it to the central office after eight months of inaction without notifying the Tribe.

b. BIA Funds/Staff Retention

Even as Ross Swimmer, Interior Assistant Secretary for Indian Affairs, has been trying repeatedly to reduce the federal work force, the BIA has been trying to retain six residual staff at the Red Lake agency office level, in apparent response to our proposal to contract every function of the agency office. It even is trying to retain a GS-14 agency superintendent to supervise no programs. It also is trying to retain the function of criminal investigator because it believes only the BIA, not the Tribe, is capable of performing criminal investigations. Such constant guerilla-tactics are wasteful of tribal resources and ultimately diminish our capacity to successfully contract.

V. Why Enactment of Senate Concurrent Resolution 76 is Crucial

There may be some who feel that the resolution is just a bunch of words -- hot air that will blow away over time. But its value, far more than just symbolic in nature, is enduring because the resolution sets the stage for a dramatic venture into a new era of government-to-government relations between the United States and Indian Tribes. The resolution makes possible a new approach -- a departure from the old "band-aid" response to problems -- one that ends the genocidal cycle of crisis, then superficial study, then quick-fix, then recurring crisis.

Each reservation, Tribe, Tribal Council and Tribal Chairperson has immediate, pressing problems and priorities. Indeed, this Senate Committee has spent the past year actively engaging itself and Indian Tribes in addressing these problem-specific and tribal-specific issues. But we elected Chairmen who have formed the Alliance of American Indian Leaders recognize that we must additionally work together on policy goals and issues. We have found it absolutely critical that we focus on the foundational issues that give continuing life to the specific problems that perpetually beset each of us. This must be done in order to permit the fundamental changes in Indian policies from which specific institutional changes can be made. Otherwise, our problems on the reservations will simply repeat themselves and our people will continue to teeter at the brink of destruction. This resolution promises to restore and affirm a policy direction that is consistent with the U.S. Constitution and the requirements of good faith, integrity and basic justice toward Indian Tribes.

The resolution begins an interactive process, between Indian Tribes and the Congress, of policy reorientation. It has brought us here today, identifying the problems, focusing investigation efforts, sketching out solutions, and providing public education exposure to these issues. For example, already this Committee has set up a special Subcommittee on Investigations to examine the problems and alternative solutions in a comprehensive, action-oriented way.

The resolution could pave the way for a new federal government department or independent agency that would work cooperatively in partnership with tribal governments, and eschew the domineering, arbitrary and incompetent ways of the BIA and other Indian agencies whose chief interest has been to perpetuate themselves and their personnel by presuming to manage all the affairs of Indians.

The resolution also is being raised at an historical moment in United States history. More than 200 years ago, the framers of the U.S. Constitution reviewed Indian Tribes' democracy ideas and democratic institutions, and then drew from the Tribes' experiences in constructing the United States' form of government. This resolution acknowledges this vital Indian contribution to the very foundations of the United States.

The constitutional framers embraced a legal framework that required the United States government to continue to deal with Indian Tribes by consent, not conquest. The resolution would declare it to be the renewed policy of the United States to restore relations between the United States and Indian Tribes to the constitutional model of government-to-government.

The resolution serves as a vehicle to educate the Congress and the people of this nation that the United States owes a considerable debt to Indian Tribes, known as the trust obligations arising out of treaties, agreements, and other legal arrangements based on resource exchanges. An essential part of this obligation is that all dealings with Indian Tribes must be permeated with the highest degree of good faith, care, efficiency and diligence on the part of the United States.

VI. Recommendations for Change

I am offering the following suggestions to you at this time, recognizing that some of the new directions to consider require significant analysis and review before they are politically feasible for Indian Tribes and Congress to adopt.

A. Intensive Tribal Involvement in Restoring Relations Between the United States and Indian Tribes

Congress should facilitate a comprehensive inquiry into the problems of the past and the alternative solutions that could shape the future. It should be marked by an unprecedented level of intensively interactive involvement by Indian Tribes and the United States as governments.

The Alliance of American Indian Leaders intends to conduct such an inquiry over the course of the next three years. We aim to foster tribal dialogue and debate and to develop a manageable range of recommendations accommodating the spectrum in tribal status from dependency to self-government. We seek your support for our project proposal, now being considered by the House Interior Appropriations Subcommittee.

We also pledge substantial tribal involvement in the Special Subcommittee's investigation and seek avenues to make significant contributions to your effort. We are eager to help you root out the corruption that robs us and to explore long-term solutions that will safeguard against the problems of the past.

B. Directions to Consider

1. New Department or Independent Agency

a. Problems with the Present Bureaucratic Structures

The BIA is the oldest agency of the United States. From its inception, it has been the subject of pointed criticisms for its persistent mismanagement. In recent decades, the number of federal Indian programs supposedly designed to benefit Indians has increased. This has resulted in the diffusion of these programs among nearly all of the executive departments. Notably, the Indian Health Service (IHS) was removed from the BIA in 1955. Now buried in the Department of Health and Human Services, the IHS is the object of serious mismanagement criticisms. At least nine cabinet-level departments and ten individual agencies have programs specifically affecting Indian Tribes. These programs are characterized by substantial overlap, duplication, lack of coordination, inefficiencies, and mismanagement if not fraud.

Program mismanagement, combined with the rigidly ineffective, multi-layered and self-perpetuating bureaucratic structures of the BIA and IHS, has worked to deny significant involvement by Indian Tribes in the decision-making process. Meanwhile, for more than a century, a constant stream of proposals have been made to establish a separate federal department or independent agency for Indian affairs. A theme common to all these proposals was that Indian Tribes be guaranteed the right to fully participate in all of the decisions that affect their welfare.

b. Consideration and Development of Legislation

The Alliance of American Indian Leaders has generated a draft bill to establish a new Department of Indian Affairs. We are not asking that you introduce such a bill at this time. We do intend, however, to begin working with this Committee's staff and that of the Special Subcommittee on Investigations to explore more fully the issues raised by such a proposal. Meanwhile, we have distributed the proposal to every Indian Tribe and encouraged tribal debate and dialogue on it.

Regardless of the overall shape or location of the federal structure(s) we urge that serious consideration, if not immediate action, be devoted to eliminating the extra layers of federal program bureaucracy.

2. Statutory Limitations on Plenary Power

Given the considerable doubts about the wisdom and fairness of the judicially invented plenary power of Congress over the affairs of Indian Tribes, and the fact that plenary power-based action is so often only minimally reviewable, the Congress should consider adopting limitations on its plenary power. Precedent for such a limitation might be found in the limitations on congressional powers incorporated in the 1985 measure popularly known as the Gramm-Rudman-Hollings Act. Such a limitation should also require the courts to give strict scrutiny to any statute intruding upon the exercise of sovereign powers by an Indian Tribe.

3. Legislation to Resolve Inherent Conflict of Interest Problems of the Trust Responsibility

A serious problem has emerged to dog efforts to fulfill the United States' trust responsibility -- the United States chooses to balance its duties as trustee for a private interest (i.e., Indians) against the sometimes competing interests of the general public. Under the current structure, Indian interests usually suffer.

This conflict of interest on the part of the United States could be diminished considerably were the primary responsibility for carrying out the trust responsibility vested in a robust independent department or agency with the power to match the efforts of the Department of Justice. Short of that solution, Congress could require that the United States file a bifurcated brief in federal court whenever an agency other than the BIA presents a legal position which is in conflict with the United States trust responsibility concerning Indian tribes and resources. Bifurcated briefs were actually filed on at least three occasions in the 1970s and in each instance the federal court ruled in favor of the Indian trust interest. However, the Department of Justice has opposed this practice and recently insisted that a single position be adopted, decided by its Office of Legal Counsel, which is an office that has demonstrated little if any understanding of the trust responsibility concerning Indian Tribes and resources.

The same problem erupts in federal administrative proceedings concerning the role of the Solicitor's Office in the Interior Department. The Associate Solicitor for Indian Affairs considers the Interior Secretary as his primary client, so that if there is a conflict within the Department between the trust responsibility concerning Indian tribes and resources and an Interior agency's actions, the conflict is typically resolved internally by the Solicitor and the Secretary without public input or administrative review of the trust interest.

Legislation should also be considered which would allocate funds to Indian Tribes to hire private counsel when the United States declines to proceed with legal representation of a trust interest because of a conflict or policy dispute. The funding allocation level could be fixed by statute according to litigation needs so as to avoid permitting the Office of Management and Budget to amputate trust litigation policy with an accountant's budget knife.

4. Nonvoting Delegates to Congress

We also wish to suggest consideration of the appointment of Indian representatives to the United States Senate and House of Representatives. Some Indian treaties do, in fact, provide that Tribes may send observers to Congress. While the specific details of such an idea require considerable refining and elaboration, these delegates would at a minimim certainly improve the communication flow between the Tribes and Congress, removing at least some potential for friction and mistake. They could also serve in a sort of ombudsman role that could greatly facilitate congressional relations with Indian Tribes. And they would provide a dependable perspective on the United States' trust responsibility too often overlooked in fast-paced congressional debate.

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PLEASE REPLY TO WASHINGTON, D.C. OFFICE

MEMORANDUM

TO: The Honorable Roger A. Jourdain, Chairman
Red Lake Band of Chippewa Indians

FROM: M. Frances Ayer

DATE: October 14, 1987

RE: Resolution No. 1-87 of the Red Lake Band of
Chippewa Indians

By Resolution No. 1-87 the Red Lake Tribal Council directed that we research and advise the Council about the applicability of the United States Constitution to the inherent sovereign rights of the Red Lake Band of Chippewa Indians. You explained to me that the legislative intent of the Council in enacting Resolution No. 1-87 was that a thorough legal analysis of the origin, scope and constitutional basis for the exercise of plenary power over Indian tribes by the United States Congress be prepared.

Accordingly, there follows our analysis of that issue. We hope this analysis is helpful to you and other members of the Council. It is an honor to assist you with this important issue.

JUDICIAL INVENTION OF THE PLENARY DOCTRINE

Introduction

The courts describe Congress' power over Indian tribes as being "plenary". 1/ The word "plenary" is defined as a power that is full, entire, complete, absolute, perfect, unqualified. 2/ Since the Federal Government is a government of enumerated powers, 3/ the plenary doctrine must find its source in some provision of the Constitution. But the Constitution contains no express grant of absolute or plenary authority to Congress over Indian tribes. This paper traces the source of the plenary doctrine and explains how it has evolved to its present state in the field of federal Indian law.

The plenary doctrine was created by the United States Supreme Court. It has no constitutional basis. Rather, it arose from what the Court viewed as a void in congressional powers over Indian tribes.

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[1] E.g., National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985).

[2] BLACK'S LAW DICTIONARY 1038 (5th ed. 1979).

[3] McCullock v. Maryland, 18 U.S. (4 Wheat.) 316 (1819).

During the era of colonization in America, the European nations mutually agreed that any curtailment of the inherent sovereign powers of Indian tribes should be attained only by consent. The framers of the Constitution recognized this prevailing international commitment when they forged provisions allocating powers among the federal and state governments. Over the past two hundred years of constitutional interpretation, however, the international policy of consent, upon which Indian treaties and this nation were founded, has lost its meaning. Today the sovereign powers of Indian tribes are subject to the complete and relatively unrestrained plenary control of Congress and the courts.

The plenary doctrine directly conflicts with recent international treaties and agreements to which the United States is a party. This paper, it is hoped, will provide a vehicle for serious discussion on how current federal Indian policies must change to conform to international norms and to the original intent of the Constitution.

I. COLONIAL POLICIES

In 1532, the Emperor of Spain sought the legal advice of Fransiscus de Victoria, a leading Spanish intellectual and academic, concerning the rights of Spain in dealing with Indian tribes in the

New World. [4/] Victoria concluded that tribal governments were to be respected:

> So long as the Indians respected the natural rights of Spaniards, recognized by the law of nations, to travel in their lands and to sojourn, trade, and defend their rights therein, the Spaniards could not wage a just war against the Indians . . . , and therefore could not claim any rights by conquest. In that situation, however, sovereign power over the Indians might be secured through the consent of the Indians themselves. [5/]

Though the Spanish emperors did not strictly follow Victoria's advice, they did recognize the inherent rights of Indian tribes, [6/] as did the British.

In the case of *Mohegin Indians*, the Privy Council of England upheld a 1743 ruling that required the colonists to purchase land from Indians only by means of treaties with legitimate tribal officers. [7/] The Indians were to be treated as a "separate and distinct people", with policies of their own and the power to make peace or war with other Indians, free of English control. [8/] King

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[4] *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 46-47 (U.N.M. ed. 1976).

[5] *Id.*, *citing* VICTORIA, DE INDIS ET DE JUNE BELLI RELECTIONES (transl. by John Pawley Bate, 1917), 1557, sec. 3, title 1, *et seq.* (footnote omitted).

[6] *See*, *e.g.*, *id*. at 383-84 (for a brief description of the recognized status of Pueblos under Spanish law).

[7] R. BARSH, J. YOUNGBLOOD HENDERSON, THE ROAD--INDIAN TRIBES AND POLITICAL LIBERTY 32 (1980).

[8] *Id.*, *quoting* 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES ~~218~~ (London, 1912).

George III reaffirmed the policy of Mohegin Indians by Royal Proclamation in 1763. [9]

II. The Constitution

The powers of the Crown passed to the states upon the conclusion of the American Revolution. [10] By 1781, the states had ratified the Articles of Confederation, which set forth the powers of the states and national government and laid the foundation for development of the Constitution. Article IX of the Articles of Confederation empowered Congress with the "sole and exclusive right and power" of entering into treaties. [11] It also gave Congress the exclusive power of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any state within its own limits be not infringed or violated." [12]

Article IX made clear that only the Federal Government was to enter into treaties and regulate the nation's affairs with the Indians. It said nothing about regulating the affairs of the Indians. This delegation of power to the national government was similar to that held by the Crown. The British colonies could enter into treaties with Indian tribes only if delegated that authority in charters issued by the Crown. 13/

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[9] Id., citing 7 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 663 (Richmond, Virginia, 1819-1823).

[10] See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 587 (1823).

[11] Articles of Confederation art. IX.

[12] Id.

The Article IX language was the result of a compromise between the federalists, who wanted the Federal Government to have exclusive control over relations with Indians, and some colonies, who wanted the states to deal directly with Indians. 14/ The language qualifying Congress' power so as not to interfere with state legislative rights caused great confusion and drew strong criticism from James Madison. Madison ridiculed the article as "'obscure and contradictory'", as 'absolutely incomprehensible', and as inconsiderately endeavoring to accomplish impossibilities." 15/ To clarify that the Federal Government was to deal with Indians exclusive of the states, the framers of the Constitution entirely left out the qualifying language of Article IX. 16/ Thus, the framers saw the tribes as significant governments, dealings with whom deserved a national policy.

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[13] See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554-56 (1832).

[14] F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 29-31 (1962).

[15] Id. at 30, quoting J. MADISON, THE FEDERALIST No. XLII.

[16] F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 29-31 (1962).

The Constitution, drafted to clear up the defects of the Articles of Confederation, was ratified by the states on September 17, 1787. It contains six separate provisions which affect, directly or indirectly, the relationship between the United States and Indians.

Article I provides that in apportioning House Representatives and direct taxes, "Indians not taxed" are not to be counted. [17]/ It also contains the Commerce Clause, which gives Congress the power "To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." [18]/

The Indian Commerce Clause underwent several revisions before reaching its final state:

> The Pinckney plan included "exclusive power . . . of regulating Indian Affairs." This was omitted in the first draft of the Constitution. [Charles] Pinckney then resubmitted the article as "To regulate affairs with the Indians as well within as without the limits of the United States." The Committee of Detail rewrote this as "To regulate commerce . . . with Indians, within the Limits of any State, not subject to the laws thereof," and the Committee of Eleven finally reduced it to its present state. . . ." [19]/

The plain intent of the Indian Commerce Clause was to give Congress the exclusive power of regulating commerce with Indian tribes, not all affairs of Indians. [20] Indeed, during the first century of federal legislation, Congress limited its exercise of Commerce Clause powers to the regulation of trade and intercourse with the Indian tribes. [21]

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[17] U.S. CONST. art. I, § 2, cl. 3, also incorporated in the Fourteenth Amendment, amend. XIV, § 2.

[18] U.S. CONST. art. I, § 8, cl. 3.

[19] Barsh, supra n.7, at 34 (author's emphasis).

Article I of the Constitution also provides that "[n]o State shall enter into any treaty." [22] Article II gives treaty-making power to the President, "by and with the Advice and Consent of the

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[20] Well before the Supreme Court applied the plenary doctrine to Congress' powers regarding Indian matters in 1899, which was not founded upon any express provision of the Con-stitution, the Indian Commerce Clause was held in 1876 to be "a power as broad and as free from restrictions as that to regulate commerce with foreign nations." United States v. 43 Gallons of Whiskey, 93 U.S. 188 at 194 (1876). Stephens v. Cherokee Nation, 174 U.S. 445 (1899), was the first Indian case to use the term "plenary," but the concept as to Indian matters arose in United States v. Kagama, 118 U.S. 375 (1886). Because of the development of the plenary power doctrine, the Commerce Clause has not generally been cited by the courts as a source of or limitation upon congressional power to regulate the affairs of Indians. See United States v. Wheeler, 435 U.S. 313 (1978) ("By specific treaty provision [tribes] yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." Id. at 323 (emphasis added)); cf., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. . . ." Id. at 142); but see McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from the federal responsibility for regulating commerce with Indian tribes and for treaty making." Id. at 172, n.7).

[21] See Act of July 22, 1790, ch. 33, 1 Stat. 137, carried forward in the Act of March 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of March 3, 1799, ch. 46, 1 Stat. 743; Act of March 30, 1802, ch. 13, 2 Stat. 139; Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729 (repealed in part) (codified as carried forward and amended at 18 U.S.C. §§ 1152, 1160, 1165, 25 U.S.C. §§ 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, 264).

[22] U.S. CONST. art. I, § 10, cl. 1.

Senate . . ., provided two-thirds of the Senators present concur." [23] As with the Articles of Confederation, with minor variation, the clear intent was to confer exclusive treaty-making authority upon the Federal Government.

Article IV provides that the Constitution, the federal laws made pursuant thereto, "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." [24] The clear intent of this provision, the Supremacy Clause, was to ensure that state laws would not interfere with federal laws and treaties and that Congress and the courts would honor the Constitution and treaties.

Nothing contained in the Constitution gives Congress, the executive branch, the judicial branch or the states any power to curtail the sovereign powers of tribes. The Constitution confirms the status of tribes as governments and Congress early on recognized that any curtailment of tribes' sovereign powers may be achieved only with the consent of the tribes through treaties. [25] Such a view was consistent with the well-recognized principles of international law.

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[23] U.S. CONST. art. II, § 2, cl. 2.

[24] U.S. CONST. art. IV, cl. 2.

III. Judicial Policies

A. The Marshall Court

During his nearly thirty-five year tenure as the third Chief Justice of the United States Supreme Court, [26] John Marshall authored a series of opinions which formed the cornerstone of federal Indian law. [27] Though relatively recent decisions suggest that the basic policies of the Marshall Court remain intact, [28] Chief Justice Marshall likely would be surprised if he could see today the changes wrought by the Court since his death in 1835.

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[25] See, e.g., H. Rep. No. 474, 23d Cong., 1st Sess. 13 (1834), quoted in FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 116-117 (1982 ed.) (Concerning the legislative intent of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729, the House committee recognized "that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses committed by or against Indians, of which the tribes have exclusive jurisdiction. . . . It is not perceived that we can with any justice or propriety extend our laws to offenses committed by Indians against Indians, at any place within their own limits".) (emphasis in original).

[26] 1801-1835.

[27] Principally, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and; Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[28] E.g., Williams v. Lee, 358 U.S. 217, 219 (1959); cf. Organized Village of Kake v. Egan, 369 U.S. 60, 71-75 (1962) (for a detailed discussion of modifications since Marshall's decisions).

Marshall reaffirmed many of the basic principles of international law forged by the European nations as they "colonized" America, but he faced "a cruel dilemma: either Indians had no title and no rights, or the Federal land grants upon which much of our economy rested were void." 29/ Marshall opted for a middle-of-the-road approach by devising a new form of land title. He held in 1823 that the United States--as successor to the rights of the Crown--acquired title to Indians' land by virtue of the "right of discovery", subject only to the Indians' "right of occupancy". 30/ The right of discovery gave the United States "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." 31/

In 1831, the Marshall Court was called upon to determine whether tribes were to be regarded as foreign states for purposes of invoking the original jurisdiction of the Supreme Court. 32/ The Court held that tribes are not foreign nations. 33/ Writing for the majority, Marshall opined:

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when

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[29] Cohen, Original Land Title, 32 Minn. L. Rev. 28, 48 (1947).

[30] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 at 586 (1823).

[31] *Id*. at 587.

[32] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[33] *Id*. at 20.

> their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. [34]

Marshall's above-quoted passage seems to suggest that he was of the view that Indians were overcome by conquest. In 1832, however, in the landmark decision of Worcester v. Georgia, [35] Marshall expressly rejected the proposition that Indian tribes had been subjugated by conquest, [36] and acknowledged the sovereign status of tribes with whom the United States entered into treaties:

> From the commencement of our government, congress [sic] has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All those acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States. [37]

Marshall clarified that "dependency" was a narrow concept, that while tribes were dependent upon the Federal Government for supplies and protection, their sovereign powers were to be respected. [38] He was of the view, as was Congress, that any interference with the sovereign powers of tribes could be effected only with their consent through treaties. [39] The very making of treaties by the United States with tribes, said Marshall, ranked them as nations. [40] Concerning the express provisions of the Constitution dealing with Indians, the Court held that "[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians." [41] Marshall correctly viewed the Constitution as a delegation of power to regulate United States intercourse with tribes, not the affairs of Indians.

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[34] Id. at 17.

[35] 31 U.S. (6 Pet.) 515 (1832).

[36] Id. at 543-51.

[37] Id. at 556-57.

[38] "[S]o long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country. . . ." Id. at 547.

The sense of history documented by the Marshall Court often has been ignored or altered by the Court in subsequent cases. [42] On the other hand, when the Court appears comfortable in recognizing, within limited bounds, sovereign powers of tribes, it does not hesitate to draw on Marshall Court principles. [43]

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[39] Id. at 543.

[40] Id. at 559.

[41] Id. (emphasis added).

[42] E.g., Morton v. Mancari, 417 U.S. 535 (1974) (suggesting control of tribes was attained by conquest: "'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands. . . .'" Id. at 552, quoting Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)).

[43] E.g., Merrion v. Jicarilla Apache Tribes, 455 U.S. 130 (1982) (relying in part on Worcester in recognizing the inherent power of the Tribe to impose severance taxes on non-Indians producing oil and gas under leases on tribal land).

B. The Plenary Doctrine

1. The End of Treaty Making

In 1871, the House insisted on a rider to the Indian Appropriation Act [44] which ended the making of treaties with Indian tribes. That Act provided the impetus for the Court to create the plenary doctrine.

The rider to the 1871 Act stated:

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; Provided . . ., That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe. [45]

The rider resulted from House resentment of its exclusion from the treaty-making process. [46] The intent of the Act was clear: to end treaty-making. However, this Act presented the Federal

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[44] Ch. 120, 16 Stat. 544 (1871).

[45] 16 Stat. 544 at 566 (1871) (carried forward into § 2079, Rev. Stat. (1878), 18 Stat. 364; current version at 25 U.S.C. § 71).

[46] "House resentment first resulted in legislation in 1867 repealing 'all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes,'. . . . After further unsuccessful House attempts to enter the field of federal Indian policy, the House refused to grant funds to carry out new treaties. . . . Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Indian Appropriation Act of 1871." Antoine v. Washington, 420 U.S. 194, 202 (1975) (citations omitted).

Government with a major dilemma. If the United States wanted Indian lands, for example, it could no longer obtain them because it had eliminated its principal means of dealing with tribes.

The solution to this dilemma was first noted by dictum in an 1884 case in which the Court remarked that the "utmost possible effect [of the 1871 Act] is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power." 47/

The following year, in response to the Court's ruling in Ex Parte Crow Dog, 48/ which held that United States' criminal laws did not extend into Indian country over a murder committed by one Indian against another, Congress enacted the Major Crimes Act. 49/ The Major Crimes Act extended federal jurisdiction over eight major crimes 50/ committed by Indians within Indian reservations. In United States v. Kagama, 51/ an 1886 challenge to the constitution-

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[47] Elk v. Wilkins, 112 U.S. 94 at 107 (1884).

[48] 109 U.S. 556 (1883).

[49] Ch. 341, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153) (Crow Dog recognized treaty commitments which secured to the Brule Sioux the power of self-government to administer "their own laws and customs." 109 U.S. at 568).

[50] Murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny. 23 Stat. 385. The current version adds statutory rape, assault with intent to commit rape, assault with a dangerous weapon, assault resulting in serious bodily injury and robbery. 18 U.S.C. § 1153.

[51] 118 U.S. 375 (1886).

ality of the Major Crimes Act, the Court unleashed what later was to become the plenary doctrine.

In Kagama, two Indians were indicted under the Major Crimes Act for the murder of another Indian on the Hoopa Valley Reservation. They challenged the Act as having exceeded the constitutional powers of Congress. The Court first noted that the Constitution did not authorize congressional intrusion into the law and order jurisdiction of the tribes: "[T]he Constitution . . . is almost silent in regard to the relations of the government which was established by it to the numerous tribes. . . ." 52/ Concerning the "Indians not taxed" provisions, the Court said they failed to "shed much light on the power of Congress over the Indians in their existence as tribes . . . ." 53/ Concerning the Indian Commerce Clause, the Court conceded that "we think it would be a very strained construction of this clause, that a system of criminal laws for Indians . . . was authorized by the grant of power to regulate commerce with the Indian tribes." 54/ The Court then acknowledged that tribes "thus far" had not been "brought under" federal or state laws. 55/

> But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure--to govern them by acts of Congress. This is seen in the Act of

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[52] Id. at 378.

[53] Id.

[54] Id. at 378-79.

[55] Id. at 382.

March 3, 1871. . . . [56]

What gave Congress the power to unilaterally shift from the well-established commitment of dealing with tribes on a government-to-government basis to one of imposing its will by legislation? The Court, relying in part on Worcester, [57] held that the power arose from the United States' duty of protection for its dependent wards. [58] The Court's reliance on Worcester was misplaced. Worcester made clear that the duty of protection was limited to that "which treaties stipulate", [59] to furnish supplies and to restrain intruders from entering their territory. [60] Worcester also expressly confirmed that tribes were to have exclusive authority within their territorial boundaries. [61]

The Constitution did not empower Congress to interfere with the sovereign powers of tribes, except by treaty. The only constitutional way to curtail the sovereign powers of all tribes would be to enter into treaties with each and every tribe. The 1885 Major Crimes Act was unilaterally applied to all tribes by Congress, yet no treaties were entered into to limit tribal criminal jurisdiction because the 1871 Act had cut off treaty making. By construing the 1871 Act as Congress' intent that tribes be dealt with by legislation rather than by treaty, the Court invented a scheme to free Congress from the limitations of the Constitution: constitutional treaty making was no longer operative, and the other provisions of the Constitution simply did not authorize such an intrusion into tribal sovereignty. The decision was based on a paternalistic and racist ideology: that Indians were savage incompetents in need of protection. This ethnocentric policy continues to surface today whenever implicit suggestions are made that tribes are incapable of managing their own affairs.

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[56] Id. (citation omitted)

[57] 31 U.S. (6 Pet.) 515 (1832).

[58] 118 U.S. at 383-84.

[59] 31 U.S. at 557.

[60] 31 U.S. at 547, quoted at n.38, supra.

[61] 31 U.S. at 547.

The 1871 Act is of questionable constitutional validity. The Court recently held that Congress may not alter by legislation, "[e]xplicit and unambiguous provisions of the Constitution [which] prescribe and define the respective functions of the Congress and of the Executive . . . ." [62] But that is exactly what the 1871 Act did: it curtailed the treaty-making powers of the President and Senate that are expressly prescribed in the Constitution. [63] It is unlikely, however, that the Court would find unconstitutional an act which was pivotal in forming the theoretical basis upon which nearly all Indian legislation derogating tribal sovereignty has been founded since 1871. [64]

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[62] INS v. Chadha, 462 U.S. 919 at 945 (1983) (struck down longstanding legislative practice of the "legislative veto", through which Congress reserved the power to veto administrative decisions of the executive branch).

[63] U.S. CONST. art. 2, § 2, cl. 2.

Congress could impose limitations on its exercise of legislative intrusion into tribal powers. Congress is not unaccustomed to curtailing its own legislative powers. The Gramm-Rudman-Hollings Act of 1985 [65] is one recent example. Though a portion of the Act was found unconstitutional, [66] its unaffected provisions impose stringent limitations on how the President and Congress shape annual appropriations legislation.

Similar constraints could be self-imposed by Congress in its dealings with Indian tribes. Following is a brief overview of the historical development of the plenary doctrine subsequent to the Kagama decision. It will provide an appreciation for specific proposals that could be advanced to restore the government-to-government relations between the United States and Indian tribes.

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[64] See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (upholding the exercise of presidential actions not enumerated in the Constitution but long acquiesced in by Congress); but see INS v. Chadha, at 931 n.6 (disregarding the impact the ruling invalidating the legislative veto would have on 196 different statutes). The Treaty Clause, U.S. CONST. art I, § 10, cl. 1, and the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, would provide adequate constitutional authority for other legislation not derogating tribal sovereignty.

[65] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985).

[66] Bowsher v. Synar, 106 S. Ct. 3181 (1986).

2. "Plenary Doctrine" Introduced

The first use of the term "plenary power" to describe Congress' broad, non-constitutionally based authority to legislate on Indian matters was made by the Supreme Court in 1899, in Stephens v. Cherokee Nation. [67] Stephens involved a challenge of Congress' power to establish a mechanism for determining citizenship rolls of several tribes. As to whether Congress had such authority, the Court said:

> [A]ssuming that Congress possesses plenary power of legislation in regard to [Indians], subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument. [68]

Taken out of context, it appears that the Court assumed that Congress had plenary power. [69] But the Court went on to conclude that the Act of 1871 was evidence that Congress had plenary power to legislate on Indian matters. [70] This, of course, is circular reasoning. The question was whether Congress had the power, which the Court answered by relying on an example of Congress' exercising that power. This complete deference to Congress on whether it had the power is similar to the Court's development of the political question doctrine, which comprised the next major phase of Court decisions on Indian cases.

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[67] 174 U.S. 445 (1899).

[68] Id. at 478.

[69] Some have suggested the Court was making that assumption. See, e.g., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 217, n.2 (1982 ed.).

[70] Id. at 483.

The above-quoted passage suggested that the only limitation on Congress' power to legislate on Indian matters was the Constitution itself, i.e., Congress could not pass laws affecting Indians if those laws conflicted with some other provision of the Constitution. Such limitations imply that acts of Congress would be subject to judicial review to determine whether particular legislation violated the Constitution. That implication, however, was quickly rejected by the Court.

3. Political Question Doctrine

The political question doctrine was developed by the Court to limit its review of certain matters which it finds are better left to the exclusive control of another branch of government. [71/] At the turn of this century the Court held that Congress' plenary power over Indian legislation was a political question and was, therefore, not subject to judicial review. [72/]

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[71] *See* Baker v. Carr, 369 U.S. 186 (1962) (enumerating the standards the Court applies in determining whether a particular case involves a political question); *e.g.*, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (deferring to Congress an issue involving the scope of Congress' commerce power).

[72] Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

The 1902 case which first announced this new departure in Indian law involved a challenge by the Cherokee Nation of a statute giving the Secretary of the Interior the exclusive authority to execute mineral leases on all tribal lands. [73] The Court held that the Act of 1871

> voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them. . . . [74]
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> * * *
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> The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts. [75]

The following year, in 1903, the Court extended the political question doctrine to a statute which affected specific tribes, in _Lone Wolf v. Hitchcock_. [76] _Lone Wolf_, probably more than any other case in American history, exemplifies the atrocious consequences that result when Congress and the judiciary lack sufficient standards to limit their exercise of power.

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[73] Ch. 517, 30 Stat. 495 (1898).

[74] Cherokee Nation v. Hitchcock, 187 U.S. at 305.

[75] _Id_. at 308.

[76] 187 U.S. 553 (1903).

Lone Wolf involved an Act of Congress ratifying an agreement signed by less than the number of adult males of the Kiowa, Comanche and Apache Tribes required by their treaty. The agreement called for a cession of tribal lands, but Congress materially altered the agreement in its ratifying act, and there was substantial evidence of fraudulent misrepresentations by the government officials who secured the insufficient number of signatures. Lone Wolf was an individual tribal member who was to be allotted lands pursuant to the agreement. He challenged the Act as being an unconstitutional taking of property and as being in violation of the treaty. The Court held the claim was not subject to judicial review. [77]

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. [78]

The Court was wrong on two counts. First, Congress did not attempt to interfere with "tribal relations *of* the Indians" until enactment of the Major Crimes Act in 1885. [79] Secondly, Congress' power over Indian tribes was not deemed a political one until 1902. [80] Despite the clear evidence of fraud on the part of the United States, the Lone Wolf Court concluded that "[w]e must presume that Congress acted in perfect good faith in the dealings with the Indians. . . ." 81/

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[77] Id. at 567-68.

[78] Id. at 565.

[79] Ch. 341, 23 Stat. 362, 385 (1885).

[80] Note 72, supra.

Lone Wolf paved the way for future treaty violations by the United States by holding that Congress is free to pass laws that conflict with treaty commitments. 82/ Thus, on the one hand, the Court readily relied upon treaty commitments for protection as a means of allowing Congress to interfere with tribal sovereignty; on the other hand, the Court did not hesitate to hold that Congress was under no obligation to honor treaties.

Lone Wolf implicitly overruled the suggestion made in Stephens that Congress' exercise of plenary powers would have to conform to the Constitution. This conflict was further confused by a 1914 case in which the Court looked at whether an Act ratifying a Yankton Sioux cession agreement was

> reasonably essential to their protection. . . . [I]t must be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts. 83/

More recent cases have adopted a somewhat less arbitrary approach: the "tied rationally" test:

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[81] 187 U.S. at 568.

[82] Id. at 566.

[83] Perrin v. United States, 232 U.S. 478 at 486 (1914).

> The standard of review most recently expressed is that the legislative judgment should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians. . . ." 84/

The tied rationally test is similar to the political question doctrine except that it allows for some judicial review. The problem is the lack of definite standards defining Congress' obligation. The courts have the relatively unrestrained freedom to decide whether the legislation in question is tied rationally to Congress' obligation.

3. Fifth Amendment Taking Claims

The Fifth Amendment provides, in part, that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." 85/ In Lone Wolf the Supreme Court refused to hear the Fifth Amendment taking claim and held that Congress must be presumed to have acted in good faith in its dealings with Indians. 86/ That is no longer the case. On numerous occasions after Lone Wolf, the Court has agreed to hear Fifth Amendment taking claims made by

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[84] Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 at 85 (1977), quoting Morton v. Mancari, 417 U.S. 535, at 555 (1974).

[85] U.S. CONST. amend. V.

[86] 187 U.S. at 568.

Indians, [87/] and in 1980 the Court expressly held that the political question doctrine of Lone Wolf is now inapplicable to such claims. [88/]

The government's simple assertion that it acted in good faith in its dealing with the Indians will no longer foreclose judicial scrutiny of taking claims, and courts now may look to whether the government gave adequate consideration for Indians lands. [89/]

C. Tribal Sovereignty

1. Implicit Divestiture

Culminating from the judicially-created plenary doctrine, the Supreme Court has held that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." [90/]

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[87] United States v. Cherokee Nation of Oklahoma, 107 S. Ct. 1487, 94 L.Ed.2d 704, 55 U.S.L.W. 4403 (1987); Hodel v. Irving, 107 S. Ct. 2076, 95 L.Ed.2d 668, 55 U.S.L.W. 4225 (1987); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Menominee Tribe v. United States, 391 U.S. 404 (1968); FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960); United States v. Klamath Indians, 304 U.S. 119 (1938); United States v. Shoshone Tribe. 304 U.S. 111 (1938); Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103 (1935); Choate v. Trapp, 224 U.S. 665 (1912).

[88] United States v. Sioux Nation of Indians, 448 U.S. at 415.

[89] Id. at 416-17.

[90] United States. v. Wheeler, 435 U.S. 313 at 323 (1978); accord: National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985); Escondido Mutual Water Co. v. LaJolla, 466 U.S. 765, 788, n.30 (1984); Rice v. Rehner, 463 U.S. 713, 719 (1983); White Mountain

Prior to 1978, the Court "consistently guarded the authority of Indian governments over their reservations . . ., [holding that] [i]f this power is to be taken away from them, it is for Congress to do it." [91] But in 1978, the Court invented a new judicial technique to strip tribes of their sovereign powers: implicit divestiture.

In Oliphant v. Suquamish Indian Tribe, [92] the Court held that tribes were implicitly divested of their sovereign power to try non-Indian criminal defendants for crimes committed on their reservations. In a companion case in 1978, which clarified the rule of Oliphant, the Court said of tribes that

> [t]heir incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised . . . . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. [93]

This new rule was devised out of thin air. Congress had never affirmatively divested tribes of their sovereign powers over non-

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Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

[91] Williams v. Lee, 358 U.S. 217 at 223 (1959), citing Lone Wolf v. Hitchcock, 187 U.S. at 564-66.

[92] 435 U.S. 191 (1978).

[93] United States v. Wheeler, 435 U.S. 313 at 323 (1978), citing Oliphant, n.92 supra (Oliphant in turn cited Wheeler for authority).

Indians, [94] so the Court felt it should do so. This is a dangerous precedent that gives the courts quasi-plenary powers over tribes. It is noteworthy that the Court relied on "protection" and "dependency" to fashion this new racist rule, old terms that are resurrected whenever the Court begins to chip away at tribal sovereignty.

2. Inapplicability of the Constitution

The Court long ago settled that the United States Constitution does not apply to tribal governments in their exercise of sovereign power. [95] The Court has consistently recognized that tribal powers of self-government existed prior to, and did not derive from, the Constitution. [96] However, because the Court has held that all aspects of tribal sovereignty are "subject to the superior and plenary control of Congress," [97] Congress may "limit, modify or eliminate" tribal powers of self-government almost at whim. [98]

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[94] Cf. Act of June 30, 1834, ch. 161, 4 Stat. 729 (extending federal criminal jurisdiction over non-Indians who violate federal trader laws on reservations).

[95] Talton v. Mayes, 163 U.S. 376 (1896); accord Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

[96] Talton v. Mayes, 163 U.S. at 384.

[97] Santa Clara Pueblo v. Martinez, 436 U.S. at 58.

[98] Id. at 56. Presumably, such congressional action must be tied rationally to its unique obligation [illegible]ard Indians. Morton v. Mancari, 417 U.S. at 555. Arguably, such action would also be subject to Fifth Amendment limitations, see n.87, supra.

One example of a congressional attempt to limit tribal powers was the 1968 Indian Civil Rights Act, 99/ which purported to apply limitations similar to many provisions of the Bill of Rights to tribal governments. The Court, however, has narrowly construed this particular limitation by holding that claims of alleged violations of the Act must be heard in tribal, not federal, courts. 100/ The one exception is writs of habeas corpus, of which federal courts have jurisdiction. 101/

3. Policy of Self-Government

Apart from the court-created doctrine of implicit divestiture, the Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." 102/ But just as the Court has flip-flopped on the issue of recognizing tribal

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[99] Pub. L. No. 90-284, 87 Stat. 77 (1968), 25 U.S.C. §§ 1301-1326.

[100] Santa Clara Pueblo v. Martinez, 436 U.S. 49.

[101] 25 U.S.C. § 1302.

[102] Iowa Mutual Ins. Co. v. LaPlante, 107 S.Ct. 971 at 975 (1987).

sovereignty, [103] Congress has interfered with tribal self-government as much as, if not more than, it has promoted it. [104]

On an international level, the United States consistently has supported positions concerning indigenous peoples which directly conflict with its policies concerning American Indians. [105] In 1945, the United States was party to the United Nations Charter, an international agreement among world powers "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." [106]

Concerning nations which administer "territories whose peoples have not yet attained a full measure of self-government," the members of the United Nations agreed they have a trust obligation

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[103] Compare, e.g., Oliphant, n.92, supra (holding that tribes were implicitly divested of criminal jurisdiction over non-Indians), with National Farmers Union Ins. Co. v. Crow Tribe. 471 U.S. 845 (1985) (holding that tribal courts should be given the first opportunity to determine whether they have jurisdiction over civil matters involving non-Indians).

[104] Compare, e.g., "Public Law 280", ch. 505, 67 Stat. 588 (1953), 25 U.S.C. §§ 1321-22 (which transferred civil and criminal jurisdiction over Indian country within five states and one territory to state and territorial control), with the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, 25 U.S.C. §§ 450a-450n (which enabled the transfer of federal control of Indian programs and services to tribes).

[105] See generally Barsh, Book Review, 57 Wash. L. Rev. 799 at 804-07 (1982) (reviewing FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.)).

[106] U.N. CHARTER preamble.

> to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement. [107]

The Charter and recent United Nations treaties and interpretive resolutions, which are to supercede contrary provisions of domestic law, [108]

> have condemned "trusteeship" to the ashheap of legal history. No state has a legal right to subject another to "tutelage" on the excuse of the latter's helplessness or ignorance, and existing de facto guardianships are subject to immediate dissolution upon a determination of the administered people's own aspirations for their future political status. [109]

If the United States were truly committed to its international positions, it would seek to restore its treaty promises made to tribes by reversing the trend of the Court's and Congress' assertion of absolute power over tribes.

IV. CONCLUSION

The European nations early recognized the sovereign powers of tribes. They rejected the policy of acquiring Indian lands by conquest, but chose instead a policy of acquisition by consent, and dealt with tribes through treaties on a government-to-government basis. The American revolutionaries followed suit when they drafted the Constitution. Congress was not to have any control over tribes, other than regulating commerce with tribes, except as agreed upon by treaty. For nearly 100 years, Congress honored the original intent of the Constitution in its dealings with Indians.

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[107] U.N. CHARTER art. 73, cl. (b).

[108] Barsh, Book Review, n.105 supra, at 805, citing H. GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION, IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 11-13 (1980).

[109] Barsh, Book Review, n.105 supra, at 805.

Congress' termination of treaty-making by the Act of 1871, which is of questionable constitutional validity, opened the way for the creation of the plenary doctrine. That doctrine has allowed the courts and Congress to wield almost total control over tribes without their consent.

Senate Concurrent Resolution 76 will help restore the government-to-government relationship between the United States and Indian tribes as recognized by the framers of the Constitution. Hearings on the resolution will afford tribes the opportunity to educate the current Congress on some of the fallacies of the United States' Indian policies of the past 100 years. Tribal leaders can explain to congressional committees how the plenary doctrine of the Supreme Court is founded, not on principles of law, but on ethnocentric views of "protectionism" and "dependency", views which deviate from historical and current international commitments.

TESTIMONY OF
REID PEYTON CHAMBERS

Before the
SENATE SELECT COMMITTEE
ON INDIAN AFFAIRS

Re: S.J. Res. No. 76

December 2, 1987

Mr. Chairman and members of the Committee, my name is Reid Peyton Chambers. I am a partner in Sonosky, Chambers and Sachse, 1250 Eye Street, N.W., Washington, D.C. 20005, a law firm representing Indian tribes and tribal organizations. I am honored to appear before the Committee today to give testimony in support of S.J. Res. No. 76. My testimony will discuss the historic origins and present elements of the federal trust responsibility to American Indians, which S.J. Res. 76 reaffirms.

1. Origins: the Cherokee cases

As the Joint Resolution states, the courts of the United States have consistently recognized and reaffirmed this special relationship, as, generally, has Congress and the Executive. Modern court decisions have tested the constitutionality of acts of Congress by whether they "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." [1/] That unique obligation is deeply rooted in the Nation's history.

[1/] Morton v. Mancari, 417 U.S. 535, 555 (1974); Delaware Business Committee v. Weeks, 430 U.S. 73 (1977).

The United States Supreme Court first discussed the trust obligation in Chief Justice John Marshall's early decisions dealing with the Cherokee Nation. In the Cherokee cases, the Court held that Georgia's laws had no force and effect in Cherokee territory because the Cherokee Nation was a "distinct political society." Speaking for the Court, Chief Justice Marshall stated that "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . , marked by peculiar and cardinal distinctions which exist no where else." While Chief Justice Marshall held that Indian tribes are not independent foreign nations, he concluded that they "may, more correctly, perhaps, be denominated domestic dependent nations." Their "relation to the United States resembles that of a ward to his guardian," the Chief Justice stated.

Chief Justice Marshall's Cherokee decisions considered that the unique trust relationship derived from treaties between the United States, or the British Crown before it, and the Cherokee Nation, and from federal Indian statutes like the Indian Trade and Intercourse Act. Those treaties and statutes, in terms of their express language, protected Indian lands and natural resources from alienation. Then, as is common today, the beneficial ownership to the land was the Indians. The United States held fee title in trust for the Indians, a trust guaranteed in the treaties and by Acts of Congress.

2. Property-related trust obligations

In the 150 plus years since Chief Justice Marshall wrote, most cases elucidating the trust relationship have also dealt with property rights -- chiefly rights to land, rights to the use of water, rights to mineral resources, and rights to hunt and to fish. These cases have set a high standard; the Government's conduct with respect to Indian lands and resources "should . . . be judged by the most exacting fiduciary standards." [2] The Supreme Court has held that federal officials have "moral obligations of the highest responsibility and trust," [3] and are "bound by every moral and equitable consideration to discharge its trust with good faith and fairness." [4] More specifically, the cases have held that the Federal Government may not "give the tribal lands to others, or . . . appropriate them to its own purposes."[5] In general, the courts have held that the United States should be judged at least by the standards and principles of law as would be applied to an ordinary fiduciary in its dealing with Indian property. This has been held to include a duty of care[6] a duty to make property productive[7] and a duty of loyalty.[8]

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[2] Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

[3] Ibid.

[4] United States v. Payne, 264 U.S. 446, 448 (1924).

Of course, Mr. Chairman, these duties have not always been honored. Sometimes, for example, there has been a conflict of interest between Indian rights to resources such as land, water, timber, minerals and rights to hunt and fish and the claims and demands of other federal agencies --

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[5] E.g., United States v. Creek Nation, 295 U.S. 103, 110 (1935).

[6] Menominee Tribe v. United States, 101 Ct. Cl. 10, 19-20 (1944).

[7] Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 n.d. Cal. (1973).

[8] Navajo Tribe v. United States, 364 F.2d 320, 322-24 (Ct. Cl. 1966).

national parks, fish and wildlife refuges, the public lands, public dams and water projects, and the like.

Where conflicts of interest between Indian rights and other public projects are presented, special obligations of trust should influence and control the decisions of the Executive Branch. If the United States decides to build a dam which may injure fish resources, or to take public lands within a national park or protected wildlife refuge, that is of course a straight public policy decision. Private interests will support or oppose the policy, but ultimately the Government as a policy maker must reach the decision. But when Indian rights are involved, the United States is a trustee for invaluable Indian property interests. When the United States subordinates Indian rights to his conflicting public policy responsibilities, a breach of trust occurs, at least where there is a reasonable and legitimate support for the Indian position. This is because a trustee should subordinate his own interests to those of his trust beneficiary.

When the United States rules against Indian rights in this kind of situation, it is guilty of a prohibited conflict of interest. The Supreme Court unfortunately ruled in the Pyramid Lake case that the Executive may sometimes have the power to override a reasonable and legitimate Indian position -- if, for example, Congress has authorized the

Executive to "wear two hats," and act in favor of the non-Indian project. However, this kind of action is morally odious, subjects the United States to legal liability, and ought to be avoided. This Joint Resolution would, as I understand it, state this objective as congressional policy.

3. The trust obligation to protect tribes' governmental authority

While property-related duties have been the direct concern of most court holdings, the courts have also made it clear that the central purpose of the trust relationship is, as Chief Justice Marshall explained, to protect the tribes' existence as distinct political societies. Indeed, probably the primary purpose of protecting the lands and natural resources is to allow the tribes to function as governments and to exercise political autonomy. Without a protected land base, it is doubtful that tribes could long function as distinct political societies.

Thus, the result of the trust responsibility is a government-to-government relationship between tribes and the United States whereby the United States protects the authority of Indian tribes to "make their own laws and be ruled by them." For this reason, courts have held that the tribes' rights to self-government are protected by federal law even without a specific federal statute doing so, and have held that state laws that would interfere with tribal self-government are for that reason alone preempted because they conflict with overriding federal law and policy. [9]

Because the central purpose of the trust responsibility is to protect the political autonomy and self-governing status of tribes, there is no conflict between the trust responsibility and the policy of tribal self-determination. Both strive toward the same goal. The trust responsibility does not exist because Indian tribes are some kind of incompetent or baby needing the paternalistic control of a guardian. Rather, it exists because of the federal promises to foster and preserve tribal self-government and the tribal existence as a distinct political society. That was true in Chief Justice Marshall's day and it is true today.

4. Trust obligation to provide services

There is a third area in which the trust relationship operates, although its precise impact is somewhat more amorphous. By incorporating the lands and territories of Indian tribes within the federal republic, the United States assumed as part of its trust obligation a duty to provide services to Indians comparable to those provided other citizens of the United States. Indeed, it could be argued that because of special needs and because of their unique contribution to the American political commonwealth in the form of land and other resources ceded, Indian tribes and their members should receive even greater services than ordinary American citizens.

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[9] E.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

This aspect of the trust responsibility has been less the subject of court cases than the other two areas. This is because this element of the trust responsibility is more the province of Congress than the courts, more the job of policy makers than lawyers. Congress has responded to this duty in recent years by statutes such as the Indian Financing Act to promote Indian economic development, the Indian Education Act and the Indian Health Care Improvement Act, to name a few legislative initiatives. And where Congress has exercised its trust responsibility to provide services, courts have directed executive officials to fulfill their responsibilities not shirk them. For example, the courts have recently held that the Indian Health Service must serve as an advocate for Indian health care needs and, even if the ultimate health service or payment should be made by the state, the Indian

Health Service should represent the Indian in securing payment from the state. [10]

But performance of the United States of this aspect of the trust responsibility has been, by any measure, disappointing. Despite the efforts of Congress, the Indian people do not have the same economic standard of living, or educational opportunities or health care services as other Americans. The trust responsibility in this, as in other respects, is an unfulfilled promise.

That is why it is important in S.J. Res. 76 to reaffirm the trust responsibility in all its aspects -- the protection of Indian property, the preservation of tribes as distinct political societies, the provision of adequate services. While the trust responsibility exists in full force whether or not the Resolution is enacted, it is important to remind the American people on the two hundredth birthday of our Constitution that in this area there is major unfinished business, that performance has not matched promise. No new policy is needed; instead the longstanding trust responsibilities of our Nation to Indians must be implemented.

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[10] McNabb v. Heckler, No.86-3711 (9th Cir. October 1, 1987); White v. Califano, 581 F.2d 697 (8th Cir. 1978).

The ultimate promise of the trust responsibility is that the Federal Government should serve as an advocate for tribal rights. Institutionally, this means that Congress and all executive agencies of the Federal Government should be scrupulous in not interfering with Indian property rights, in fostering tribal self-government, and in providing services to Indian people. This should be particularly the duty of the Bureau of Indian Affairs, other agencies dealing with Indians such as the Indian Health Service, the legal counsels to those agencies within the Government, and the Department of Justice in its representation of Indians as trustee. I hope and believe that enactment of Senate Joint Resolution 76 will further these goals.

Thank you very much for the opportunity to appear before you. I would be happy to answer any questions you may have.

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January 21, 1988

Michael Mahsetky, Esquire
Senate Committee on Indian Affairs
838 SHOB
Washington, D.C. 20510-6450

Re: S.J. Res. No. 76 (198.21)

Dear Mike:

The Interior Department has now located the draft which I prepared in 1974 at the instruction of Solicitor Kent Frizell concerning definition of the Department's trust responsibility. In looking it over, I find that there were actually two memoranda -- a summary to be sent from the Solicitor to the Secretary and a more comprehensive definition of the trust responsibility from me to the Solicitor.

My recollection is that these memoranda were discussed at a regional and field solicitor's meeting in Scottsdale in the spring of 1974 but that it was decided not to finalize them. The Department has provided me with a copy and I am providing you with one. You are welcome to use it as you wish. It was a draft document and was never adopted as an official pronouncement of Interior Department policy.

Best personal regards.

Sincerely,

Reid

Reid Peyton Chambers

Enclosure

RPC/ckpe

SCOTT KEEP
DIVISION OF INDIAN AFFAIRS
SOLICITOR'S OFFICE
DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C. 20240
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Memorandum

To : Secretary of the Interior

From : Solicitor

Subject : Definition of the Department's Trust Responsibility to the Indians

I am enclosing a detailed memorandum setting forth our analysis of the origins and scope of your trust responsibility to American Indians. The purpose of this memorandum is to summarize, in concrete form, the principles of the trust responsibility as they relate to the various aspects of your administration of Indian Affairs.

I. *"Ordinary Fiduciary" Duties*

In dealings with Indian property, the case law is clear that officers of the Department have obligations of the "highest responsibility and trust" and that their conduct "will be judged by the most exacting fiduciary standards." *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942). Accord, *Mason* v. *United States*, 412 U.S. 391 (1973). In particular situations, officials of the Department must adhere to at least as rigorous standards as those which bind a private trustee of private property. *Menominee Tribe* v. *United States*, 101 Ct. Cls. 10, 19 (1944). Although the Indian tribes to whom this trust responsibility pertains are generally those recognized by treaty, agreement or statute, the doctrine of the trust responsibility appears to exist as an independent legal doctrine, a sort of a federal common law. The ordinary law of trusts cannot be summarized in general tablet form to fit all the varied circumstances which may arise, and this office should be consulted before officials take action in particular cases. In general, the trustee must take at least the same care in preserving and protecting the rights of his beneficiary as a man of reasonable prudence would take in his own affairs. He owes a high duty of diligence, care and skill.

DRAFT

The property rights that are the subject of the trust duties include land, water, minerals, timber, trust funds and hunting and fishing rights. Indian trust land or land that is restricted against alienation totals approximately fifty million acres. About forty million is tribally-owned; the rest is individually allotted. 1/ In addition, Indians have asserted claims to other lands--lands which are presently administered by other federal agencies or in which states or private persons have also claimed ownership rights. As trustee, the Department may have a legal obligation to assist in the return of these lands to the Indians, for a trustee owes a duty to enforce the reasonable claims

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1/ Under the Alaska Native Settlement Act, the trust responsibility appears to extend to 40 million additional acres of lands selcted by regional and village corporations.

of his beneficiary. This duty has in the past often been performed by the United States with respect to Indian land claims. *E.g.*, *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *Cramer* v. *United States* 261 U.S. 219 (1923); *Heckman* v. *United States*, 224 U.S. 413 (1912). The trustee also owes the beneficiary a duty of loyalty; he has been held enjoined from "giv(ing) the tribal lands to others, or. . .appropriat(ing) them to its own purposes." *United States* v. *Creek Nation*, 295 U.S. 103, 109-110; *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919).

Minerals underlying Indian reservations are generally owned in trust for the tribal or individual Indian surface equitable owner. In some instances, Indians own equitable title to subsurface rights beneath lands ceded to the United States. As with lands, the trustee cannot lawfully misappropriate Indian mineral rights to its own use. *Navajo Tribe* v. *United States*, 364 F. 2d 320, 322-324 (Ct. Cl. 1966). Tribal and individual timber resources are similarly held in trust (*see Squire* v. *Capoeman*, 351 U.S. 1 (1956)), as are Indian hunting and fishing rights. *United States* v. *Oregon*, 302 F. Supp 899 (D. Ore. 1969); *United States* v. *Washington*, _____ F. Supp _____ (W.D. Wash., Feb. 12, 1974). In both these above cases, and in the more distant past, the United States as trustee has undertaken an obligation to protect the beneficial rights of the Indians to hunt and fish. *Seufert Bros.* v. *United States*, 249 U.S. 194 (1919); *United States* v. *Winans*, 198 U.S. 371 (1905).

The trust relationship also clearly extends to Indian water rights. See *Winters* v. *United States*, 207 U.S. 564 (1908); *Arizona* v. *California*, 373 U.S. 546, 599-601 (1963). The federal trustee is required to protect Indian water rights by appropriate affirmative action. In the Pyramid Lake case, officials of the Department were enjoined from administering the waters of an interstate river system in a manner that failed fully to protect tribal water claims. *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp 252 (D.D.C. 1972). The court held that administratively the tribe's claims must be supported by the Department in its water allocations, because they were "well-founded."

DRAFT

Another area of the Department's trust responsibility lies in its administration of tribal trust funds. In *Seminole Nation* v. *United States*, 316 U.S. 286 (1942), the government was held liable for paying tribal annuities required by law to be distributed *per capita* to individual members to a tribal governing body which it knew to be corrupt and which absconded with the funds. In *Manchester Band of Pomo Indians* v. *United States*, 363 F. Supp 1238 (N.D. Cal. 1973), the Court held that the Department has a duty to invest tribal funds in the highest interest-bearing account permitted by law. *Accord*, *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10 (1944).

Summarizing thus far, as a trustee bound by the ordinary fiduciary standards, this Department and its officials must exercise reasonable care, skill and diligence in preserving trust property, protect such property against waste or loss, and take reasonable steps to enforce Indian claims of entitlement to trust property and to see to it that trust property is productive of a reasonable return. Cases like *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States* v. *Creek Nation*, 295 U.S. 1003 (1935) and *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp 252 (D.D.C. 1972) suggest that Department officials must also adhere to a duty of loyalty in the administration of trust property. As trustee, the Department must take care not to misappropriate trust assets to its own use or give them to others. Put differently, Department agencies with interests that conflict with the trust responsibility should, I believe, order their own activities so as to avoid injury to trust resources.

2. "Conflict of Interest" Problems

This last conclusion is less substantiated in the case law than the duties discussed earlier, but I believe it to be a sound legal principle. Most of the cases discussed in this memorandum involve Department activities which directly pertain to the management of Indian property. They do not concern activities of other bureaus or agencies within the Department which impair Indian rights. This latter situation--sometimes referred to as a "conflict of Interest" within the Department--is, however, the subject of some cases. The early Supreme Court cases of Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) and Cramer v. United States, 261 U.S. 219 (1923) set aside attempts by the General Land Office to convey Indian lands as if they were public lands. More recently, Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp 252 (D.D.C. 1972) held that in allocating water between a reclamation project and an Indian lake, the Secretary is required to give a higher priority to the Indian needs than to the conflicting non-Indian project, except as specifically required to do otherwise by statute, court decree or contract.

DRAFT

Although the matter is not so well established as to be entirely free from doubt, I conclude that the Department, as a fiduciary, must give preference to reasonable Indian claims over conflicting policy objectives. As the enclosed memorandum concludes 2/:

> "If there is a reasonable probability that a public project will injure Indian trust property (and Congress has not specifically authorized the injury), the Secretary must act to forestall the interference with Indian trust rights. In a different context, Indian claims of entitlement must be supported wherever they are reasonable; they must be given the broadest reasonable ambit rather than the narrowest. Accordingly, technical disputes as to which there is a range of possible reasonable solutions (e.g., the measure of *Winters* Doctrine water rights) must be resolved at the edge of the spectrum most favorable to the Indians."

DRAFT

This principle, I believe, has two limitations. First, as trustee, the Department is not obliged to espouse *unreasonable* Indian claims. Compare *Mason* v. *United States*, 412 U.S. 391 (1973). Secondly, Congress can specifically direct the Department to act other than as a trustee. Cases such as *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1902) and *United States* v. *Kagama*, 118 U.S. 375 (1886) confirm a broad congressional power to alter the terms of treaties and change the purposes of the trusteeship, and to authorize the taking of Indian property. Flexibility is thus retained in the formulation of public policy; the Department can be *authorized* to take Indian property or otherwise relieved of its exacting fiduciary duties. Congress must, however, specify such an intent with clarity; absent a clear indication of congressional intent to take Indian property, courts will presume that Congress intends adherence to the trust obligations and will construe doubtful expressions in statutes favorably to the Indians. _Menominee Tribe_ v. _United States_, 391 U.S. 404 (1968); _United States_ v. _Santa Fe Pac R._, 314 U.S. 339 (1941); _Choate_ v. _Trapp_, 224 U.S. 665 (1912).

My conclusion, then, is that in situations where there is a conflict between a program or policy of an Interior agency and an Indian claim to trust property, Department officials must give preference to the Indian claim if there is a reasonable basis for that claim. In other words, our agencies must "bend over backwards" to avoid infringing Indians rights.

DRAFT

3. _Non-Property Aspects of the Trust Responsibility--Self-Determination_

In the administration of Indian property, the Secretary has been charged with a large number of statutory duties. Indian trust property cannot be sold, 25 U.S.C. §177, and cannot be leased, willed or otherwise alienated or encumbered without the Secretary's approval. 25 U.S.C. §§415, 373, 81 _et seq_. But in giving and withholding approval, the Department has concentrated upon one aspect of the trust responsibility: protecting the Indian "ward" from his own incompetence. Yet there is strong historical evidence that the trust relationship--far from suggesting tribal incompetence--originated as a recognition of tribal autonomy and a confirmation of tribal powers of self-government. In Worcester v. Georgia, 31 U.S. (6 Pet) 515 (1832) and Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 (1831)--the seminal cases in which Chief Justice Marshall framed the trust responsibility concept--Georgia statutes were held inapplicable in Indian country because federal treaties and statutes had secured and guaranteed a strong measure of self-government to the tribe.

The underlying purpose of the trust relationship is, in my opinion, to honor that federal guarantee of self-government, and the promise of the early treaties that Indian retained lands could be the base for a separate culture and polity. In this regard, the strict property-related fiduciary standards are a means toward the end of guaranteeing for Indians a viable option to exist as a rural land-based society. For if tribal government and culture are to exist, they must have some secure land base to function upon and govern, water to irrigate theland, fish and game in the streams, income from timber and mineral development.

DRAFT

In this sense, the "self-determination" theme in President Nixon's 1970 Message to Congress is not inconsistent with the trust relationship; instead, it is fully compatible with its ancient purposes. Of course, in particular instances, the trust responsibility may limit self-determination. But in a federal system, no entity has absolute self-determination: all political institutions function amidst checks and balances and subject to limitations on their sovereign powers.

There may be a need, however, to constrict the exercise of discretionary management of Indian property by the Department in light of the increased recognition of tribal self-determination. For unbridled federal discretion threatens viable tribal self-government. Federal authority should not be excessive; nor should it assure the improvidence of the trust beneficiary. Rather, it should be exercised so as to further tribal self-determination within the limitation of preserving tribal lands, resources and culture.

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Ocasionally, the trust responsibility has been discussed in cases that do not concern proprietary rights. For example, *Morton* v. *Ruiz* _____U.S._____ (February 20, 1974) appears to stand for the proposition that the Department owes Indians a duty to adhere scrupulously to fair procedures (slip op., p. 36). Compare *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970).

Ruiz may also suggest that the trust responsibility comprehends a duty to provide some federal services to Indians, although other cases have rejected such a suggestion. See *Gila River Pima-Maricopa Tribe* v. *United States*, 427 F. 2d 1194 (Ct. Cl. 1970); compare *Ft. Sill Apache Tribe* v. *United States*, 477 F. 2d 1360 (Ct. Cl. 1973). In the exercise of the Department's statutory powers to approve Indian wills and leases, contracts and ordinances, carefully drawn regulations need to be issued setting forth precise standards for granting or withholding of Departmental approval in coordination with a more comprehensive approach to the purposes of the trust responsibility.

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Preliminary Draft Memorandum

To : Solicitor

From : Associate Solicitor for Indian Affairs

Subject : The Secretary of the Interior's Trust Responsibility to the Indians

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You have asked that I outline, in general form, the attributes and legal obligations encompassed within the Secretary of the Interior's trust responsibility to American Indians so as to assist administrative determinations and the formulation of policy. That the United States, and principally the Secretary of the Interior as its chief administrative officer dealing with Indians, 1/ stands in a fiduciary relationship to American Indians is well established. The existence of this trust relationship was most recently confirmed

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1/ The Secretary of Interior has been entrusted by Congress with most aspects of the administration of Indian Affairs. E.g., 5 U.S.C. §1457(10). A significant exception is the Indian health service, which is under the jurisdiction of the Department of Health, Education and Welfare. 68 Stat. 674 (1954). And other federal grant-making agencies provide substantial financial support to Indian tribes. See generally Schifter, Trends in Federal Indian Administrati
15 S. Dak. L. Rev. 1 (1970).

in the message of President Nixon to Congress on July 8, 1970. 2/ But for a well established doctrine, the origins and scope of the trust relationship are exceedingly murky. In order to delineate the legal components of the trust responsibility, therefore, I believe that it is necessary to delve at least somewhat into the history of the federal relationship toward Indians and specifically into early nineteenth century cases which first elucidated that relationship. Accordingly, this memorandum is somewhat more esoteric than I would like. I will precede it with a brief summary of my conclusions, providing in the process an organization for the entire memorandumm.

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2/ Message of President Nixon to Congress transmitting Recommendations for Indian Policy, 116 Cong. Rec. 23,131 (1970):

> "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently, they are also the subject of extensive legal dispute."

Summary and Conclusions

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I

In the first part of the memorandum, I will attempt to describe the origins and nature of the Secretary of the Interior's trust responsibility from a historical perspective. I conclude that the trust responsibility is basically derived from treaties with and statutes concerning the various Indian tribes, and (after the treaty making power was limited by Congress in 1871 3/) from the later executive orders and agreements with Indian tribes. 4/ The legal effect of these treaties and agreements was the cession by the tribes of almost all lands which had been aboriginally used and occupied by them. Early case law and the executive practice of the federal government recognized that Indian tribes did possess a kind of legal title to those lands habitually possessed and occupied by them; 5/ consequently, treaties and agreements were necessary to accomplish the extinguishment of that title and opening of the lands to non-Indian settlement. A contrary notion, that Indians were mere tenants at will or sufferance

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3/ 16 Stat. 566 (1871); 25 U.S.C. 871.

4/ See F.S. Cohen, Handbook of Federal Indian Law, p. 67 (1942).

5/ Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); see United States v. Santa Fe Pac. R. Co., 314 U.S. 339 (1941).

of the United States and held no lawful claim to the lands they possessed, was definitively rejected by the Supreme Court in the early Cherokee cases. 6/

Therefore, the treaties and agreements represented a kind of land transaction, contract, or bargain. The ensuing trust relationship was a significant part of the consideration for that bargain offered by the United States. By the treaties and agreements, the Indians commonly reserved part of their aboriginal land base and this reservation was guaranteed to them by the United States. 7/ By administrative practice and later by statute, the title to this land was held in trust by the United States for the benefit of the Indians. The Indians came to be recognized as holding full beneficial ownership to the retained lands and the equitable title to them. The principal legal limitation upon this ownership was a series of statutory proscriptions against alienation of the land to anyone other than the

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6/ *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet) 1 (1831) and *Worcester* v. *Georgia*, 31 U.S. (6 Pet) 515 (1832), discussed *infra* pp

7/ Compare *United States* v. *Winans*, 198 U.S. 371, 381 (1905); "the treaty was not a grant of rights to the Indians, but a grant of the rights from them--a reservation of those (rights) not granted."

United States. From the earliest Congress, and even before, a series of enactments served as a statutory protection for Indian occupancy of lands retained by them.

II

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Of course, as the frontier expanded westward, new cessions and agreements were concluded with the Indian tribes that were less favorable to them than had been the original agreements. The second part of the memorandum describes various legal decisions confirming and recognizing a *congressional* power to modify (or even abrogate) treaties and to alter the boundaries of Indian reservations, 8/ even to the extent of terminating entirely the trust relationship with particular Indian tribes. This power is itself premised on the trust relationship. In this respect, the trust responsibility of the Congress to the Indians is somewhat different than that of the Secretary. Courts treat the trust responsibility as only a kind of moral limitation upon Congress. The sole legal limitation is that Congress must make a good faith effort at compensating the Indians for the

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8/ E.g., *Lone Wolf* v. *Hitchcock* 187 U.S. 553 (1902); *Kagama* v. *United States* 118 U.S. 375 (1886).

taking of their property which has been recognized by earlier treaties or statutes. 9/ By contrast, other court decisions which I discuss are clear that the Department of the Interior and other executive agencies possess no independent power to modify treaties. This limitation now also extends to executive order reservations. 10/ Unless directed to do otherwise by Congress, the Secretary is required assiduously and vigorously to enforce the trust responsibility. This portion of the memorandum then concludes with a discussion of the modern case law which strongly indicates that in the administration of Indian property, the Secretary of the Interior is required to adhere to obligations analogous to those binding an ordinary trustee.

I believe that this requirement--that the Secretary serve as an ordinary fudiciary--is extraordinarily exacting and demands high standards of compliance which are frequently difficult to meet, particularly given the conflicting statutory

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9/ Klamath & Modoc Tribes v. United States, 304 U.S. 119 (1938 Chippewa Indians v. United States, 301 U.S. 358 (1937); Shoshone Tribe v. United States, 299 U.S. 476 (1937).

10/ See 25 U.S. §398d, enacted in 1927. Prior to that date, the case law suggests that executive departments might modify boundaries of executive order reservations without paying compensation. E.g., Sioux Trbe v. United States 316 U.S. 317 (1942). A contrary result, however, had been reached by Attorney General Harlan Fiske Stone, 34 Ops. A.G. 171 (1924), and Congress ultimately adopted Ston view in the 1927 statute. The result of the Sioux Tribe case has also received scholarly criticism. Note, Tribal Property Interests in Executive-Order Reservations: Compensable Indian Right 69 Yale L.J. 627 (1960).

responsibilities of the Secretary for reclamation projects, the management of public lands, national parks, wildlife refuges etc. It is my conclusion, however, that the trust responsibility directs that, in the event of conflict between a reasonable claim by the Indians to a proprietary entitlement and a conflicting claim by another Bureau, preference is required to be given to the Indian claim. In other words, the Secretary as trustee must so order his other activities as to avoid interfering with a reasonable claim of entitlement of an Indian tribe or band to particular natural resources. And in measuring the extent of the Indians' claim of entitlemen to a particular natural resource (e.g., water under the *Winters* doctrine), the Secretary as a careful and prudent trustee is obligated to espouse the maximum reasonable entitlement for the Indians. His trust duties include an obligation toward affirmative action, particularly in situations where past inaction has led to the loss of valuable trust property rights (again, the water rights area is a prime example). This I recognize is a controversial and difficult conclusion, and one that it is likely to be the subject of future litigation and administrative controversy.

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III

Finally, although it is not enforced in the case law, I believe that a principal aspect of the Secretary's trust responsibility relates not simply to the preservation of a land and resource base for Indians, but also to the protection and nurturing of Indian tribal self-government. It should be emphasized that the principal early cases to deal with the trust responsibility--the landmark decisions by Chief Justice Marshall in the two Cherokee cases--did not deal directly with proprietary entitlements but instead concerned the right of the Cherokees to be free from state regulation on their reservation. To be sure, the precise steps which the Secretary takes to fulfill this aspect of the trust responsibility are less likely to be the subject of successful court challenge by Indian plaintiffs. The Secretary consequently has more discretion in deciding how to fulfill the "self-government" component of his trust responsibility. But while his discretion is not likely to be judicially reviewed, performance by the Secretary

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of this aspect of the trust responsibility is a matter of the greatest importance. For it is certain that--as in the international sphere in the administration of colonies (which are also regarded as "trust territories" or as the subject of some sort of trust responsibility under the U.N. charter 11/)--a prime goal of any political trusteeship is a substantial measure of self-determination in the beneficiary of the trust. The President's Message recognizes this, for its central goal is maximizing Indian self-determination. As I perceive it, such self-determination is not logically inconsistent with enforcement of the trust responsibility. Indeed, the other property-related duties could be regarded as a means toward achieving the "self-determination" objective. For it is hollow to speak of a guarantee of self-government without also protecting a land base over which tribal authority is to be exercised, water to make that land abundant, hunting and fishing rights to sustain the tribal population living on the land etc. True, other aspects of the trust responsibility may limit quantitatively the extent of self-determination. But in that sense, a tribe may bear a relationship to the United States somewhat similar to that of a home rule municipality to a state government. Each has recognized sovereign powers except as specifically preempted by the legislature.

11/ The two pertinent articles of the U.N. Charter concerning non-self-governing territories stress the principal objective of the "trusteeship" to be attaining self-government. Article 73 concerns all territories and provides in part:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

Article 76 concerns those territories placed in formal trusteeship status; it provides:

> The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
>
> a. to further international peace and security;
>
> b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and

as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic and commercial matters for for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice, to the attainment of the foregoing objectives and subject to the provisions of Article 80.

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A contrary notion of the Secretary's trust responsibility, and one which has some historical support, would vest in the Secretary discretionary and primarily unlimited power to administer Indian land and resources in any manner he believes to be "in the best interests" of the Indians. Such a limitless and broad gaged Secretarial power is in conflict with my view of the trust responsibility which allows exercise of more precisely limited powers directed toward preservation of Indian land and resources and the establishment and furtherance of Indian self-government. This alternate concept of the trust responsibility is also inconsistent with the President's Message and, more generally, with prevalent views of the appropriate relationship between the government and the governed which limit the powers of the former.

But, regretably, in a number of areas concerning the management of Indian property, statutory discretion is vested in the Secretary without limit. There is a resulting temptation and tendency to exercise this discretion with open-ended paternalism. To illustrate: The Secretary has vast statutory powers to approve or disapprove transactions dealing with Indians' land and funds.

Indian land cannot be sold, 12/ leased, 13/ passed by testamentary disposition, 14/ or otherwise alienated without approval by the Secretary. 15/ There is need to formulate standards and focus with precision upon the requirements of the trust responsibility in deciding how these administrative approval powers should be exercised. For in promulgating standards as to how he will exercise his approval powers, the Secretary gives content and specificity to how his trust responsibility will be exercised. In the memorandum I will focus on the leasing areas as one example of a situation in which more exact administrative standards, consistent with the elements of the trust responsibility here set out, can be provided.

12/ 25 U.S.C. §177.

13/ *E.g.*, 25 U.S.C. §415.

14/ 25 U.S.C. §373. Compare *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970).

15/ Contracts, including those to hire attorneys cannot be validly executed affected trust property without the Secretary's approval. 25 U.S.C. §881 *et seq*.

My conclusion in this section of the memorandum is that these powers have at times been administered in a way which to some extent detracts from the dignity of the trust relationship. The conception of the trust responsibility which emerges is that the Indian is a sort of incompetent, a ward, and hence needs paternalistic guidance as if he were an infant or functional incompetent. A fiduciary relationship, of course, needs no such presumption; indeed, the trust responsibility as developed in the case law appears to be a more limited protective status in which the rights to self-government and territorial integrity are secured. Exercise of the Secretary's statutory powers ought to be re-examined with this conception of the trusteeship in mind.

Finally, certain subjects seem outside the scope of this memorandum. I do not attempt to analyze the scope of the trust responsibility in terms of which Indian tribes or groups it pertains to. The question of which Indian tribes should be recognized as beneficiaries of the trust relationship is an important matter which needs study from a legal and policy standpoint, but this is beyond the scope of the present memorandum. Additionally, I do not consider whether the trust responsibility, standing alone and without any statutory authority, obliges or permits the Secretary to provide "services" to Indian groups. 16/

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16/ Two recent decisions by the Court of Claims might be construed as indicating that the trust responsibility does not include any independent duty to provide governmental services. Gila River Pima-Maricopa Indians Community v. United States, 427 F. 2d 1194 (Ct. Cl. 1970); see Ft. Sill Apache Tribe v. United States, 477 F. 2d 1360 (Ct. Cl. 1973). These cases may, however, stand simply for the proposition that the Indian Claims Commission Act of 1946, 25 U.S.C. §§70 et seq., does not confer jurisdiction on the Commission to provide compensation for failture to furnish services. I do not believe that any greater significance should be accorded to these decisions.

I. The Classical Marshallian Trust Responsibility

The Federal trust responsibility is a judicially formulated doctrine which was extrapolated chiefly from the administrative and legislative practice of the early Congresses and Federalist administrations. No treaty of which I am aware expressly provided that lands and other property rights secured to the tribes were to be held in trust. The first statute explicitly recognizing trust ownership in general is the Act of February 8, 1887 (popularly known as the General Allotment Act. 17/ The Act provided that the United States would hold allotments in trust for 25 years 18/

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17/ 24 Stat. 389, 25 U.S.C. §348.

18/ Trust periods to lands or reservations under the Indian Reorganization Act were extended indefinitely by that Act. 25 U.S.C. §461. For lands not under the Indian Reorganization Act see 25 CFR Appendix.

for the sole use and benefit of the allottee and at the expiration of the trust period would convey the land in fee to the allottee, or his heirs, "discharged of said trust and fee of all charges or incumbrance whatsoever...." 19/

By contrast, the courts implied a trust relationship from the early treaties and statutes as early as the 1830s.. The first Supreme Court decisions expressly to formuate the trust responsibility doctrine were the two Cherokee cases. These decisions involved the question of whether Georgia state statutes were applicable to persons residing on Cherokee Indian lands within that State. Those lands had been secured to the Cherokees by federal treaties, and the central issue in the cases concerned the nature of the relationship between the United States and the Indians which had been established by these treaties.

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19/ One of the most important consequences of this provision is that it prevents the imposition of Federal taxes on the income of Indians "directly derived" from that property. Squire v. Capoeman, 351 U.S. 1 (1956). On the other hand, the Court of Claims recently held that an administrative charge against the proceeds of timber sales was not violative of this provision--the charge being permissible trustee expense. Quinault Allottee Association v. U.S., No. 102-71 U.S. Court of Claims, ____F. 2d ____ (1973). The provision against charge or incumbrance contained in the General Allottment Act is extended under the para materia doctrine to allotments made under special allotments acts where that special act did not include such a provision. It is also extended to lands purchased for Indians or Indian tribes under authority of the Indian Reorganization Act, 25 U.S.C. §465. Stevens v. C.I.R., 452 F. 2d 741 (1971).

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The first case, Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 (1831), was filed by the tribe in the original jurisdiction of the Supreme Court to enjoin enforcement of the state statutes. In a brief opinion by Chief Justice Marshall, the Court held that it lacked original jurisdiction because the tribe was not a "foreign state" within the meaning of that term in Article III of the Constitution. The Chief Justice described the Federal-Indian relationship as "perhaps unlike that of any other two people in existence" and "marked by peculiar and cardinal distinctions which exist nowhere else."[20] Marshall agreed with the Cherokees' contention that they were a "state" in the sense of being "a distinct political society. . .capable of managing its own affairs and governing itself." [21] But he held that the tribes were not "foreign states," but rather that they were subject to the protection of the United States and might "more correctly, perhaps, be denominated domestic dependent nations." 22/ He concluded that "their relation to the United States resembles that of a ward to his guardian." 23/

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[20] 30 U.S. (5 Pet) 1, 16 (1831).

[21] Ibid.

The second Cherokee case, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), involved an appeal by two non-Indian missionaries residing on Cherokee lands from a conviction in Georgia state courts for violating some of the statutes challenged in Cherokee Nation. Speaking again for the Court, Chief Justice Marshall held the state statutes unlawful under the supremacy clause, and construed the treaties with the Cherokees and the Federal Trade and Intercourse Acts as protecting the Indians' status as distinct political communities "having territorial boundaries, within which their authority (of self-government) is exclusive. . ." 24/

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22/ Id. at 17.

23/ Ibid.

24/ 31 U.S. (6 Pet) at 557.

Marshall meticulously analyzed the treaties with the Cherokee and emphasized that their right "to all the lands within those (territorial boundaries) . . .is not only acknowledged but guaranteed by the United States." 25/ The trusteeship reflected in Cherokee Nation appears to have been implied from this guarantee, for there was no express language in any treaties specifically recognizing a trust. Marshall also analyzed the early Trade and Intercourse Acts which protected Indian land occupancy as providing as additional source for the immunity of the Cherokee's from State jurisdiction and, implicitly, for the trust relationship itself. The first of these acts, passed in 1790 by the first Congress, provided "that no sale of lands made by any Indian or any Nation or tribe of Indians within the United States shall be valid. . .unless the same shall be amde. . .(by) some public treaty." 26/ The prohibition on conveyances of Indian lands except to the United States was carried on by later enactments 27/ and survives today as 25 U.S.C. §177. These Trade and Intercourse Acts were enacted

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25/ Id at pages 561, 562.

26/ Act of July 22, 1790, 1 Stat. 137, 139.

27/ Act of May 19, 1796, §12, 1 Stat. 469, 472; Act of March 3, 1799, §2, 1 Stat. 743, 746; Act of March 30, 1802, §12, 2 Stat. 139, 143.

to secure the boundaries which had been established with Indian tribes on the border of the frontier. 28/

It was the purpose of the early treaties, enforced by the Trade and Intercourse Acts, to prohibit future westerly expansion except under the orderly direction of the Federal government, and only after Federal treaties had been concluded and ratified by Congress providing for cessions of Indian title. Thus, the proclamations and statutes did not contemplate a rigid and permanent boundary, although some of the early treaties appear to have done so. The Trade and Intercourse Acts did allow land cessions pursuant to treaty. However it was the invariant policy that Indian land should be protected by the Executive Branch (which in those days meant the military) unless Congress directed

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28/ Indeed, the policy of protecting Indian land occupancy from settler incursion had predated the Revolutionary War itself. The Royal Proclamation of 1763 had established a boundary line between American colonies and Indian country, essentially along the Appalachian Mountains. This proclamation proscribed entry by settlers into the lands marked off for the Indians and required a license for travel therein. On September 22, 1783, the Congress of the Confederation continued this prohibition by a similar proclamation. Journals of the Contintental Congress, XXIV, page 264; XXv, page 602. See 18 Ops. A.G. 236, 237 (1885).

and confirmed subsequent land cessions. This protection of Indian lands was central to the Indian policy of the early Federalist and Jeffersonian administrations. 29/

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29/ It appears that the trust doctrine elucidated by Marshall was intended to state and confirm this administrative practice. Particularly instructive is an early report, dated June 15, 1789, to President Washington by his Secretary of War, Henry Knox. Knox reviewed and considered "two modes" whereby disturbances between Indian and settlers "on the frontier are to be quieted." American State Papers, Volume VII, pages 12-14. One approach considered by Knox "is by raising an Army and extirpating and refractory tribes entirely." The other is "by forming treaties of peace with them, in which their rights and limits should be explicitly defined, and the treaties observed on the part of the United States with the most rigid justice." In part, Knox recommended against the first approach because of insufficient finances for the waging of a general Indian war. But he also observed that such a war would be inconsistent "with the principles of justice and the laws of nature." Knox suggested the forcible dispossession of the Indians from their territories might violate the law of nations as well. He wrote, "it is presumuable that a Nation solicitous of establishing its character on the broad basis of justice, would not only hesitate at but reject every proposition to benefit itself by the injury of any neighboring community, however, contemptible and weak it may be. . ." Ibid

* * * *

"The Indians being the prior occupants possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of occupancyin the case of a just war. To dispossess them on any other principle would be a gross violation of the fundamental laws of nature and of that distributive justice which is the glory of a Nation." Ibid

The guarantee of lands reserved to the Indian in the treaties was considered by the Federalist Administrations to be a binding pledge of faith, similar to a trust obligation. 30/

The mechanics, then, by which the trust relationship was created were as follows. A treaty would be established confirming certain boundaries in the Indian tribes. The boundaries were recognized by a pledge of faith of the United States to the tribes. Executive officials were bound to respect and to enforce those boundaries unless

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30/ For example, Secretary of War Henry Knox certainly considered enforcement of the treaties to be obligatory upon the government. In a memorandum to President Washington dated July 7, 1789, he wrote that: "All treaties with the Indian Nations however equal and just they may be in their principles, will not only be nugatorybbut humiliating to the sovereign unless they be guaranteed by a body of troops." Complaining specifically of settler intrusions onto lands secured to the Cherokees by the 1785 Treaty, Knox observed that "if so direct and manifest contempt of the authority of the United States be suffered with inpunity. . .the Indian tribes can have no faith in imbecile promises and the lawless whites will ridicule the government. . . ." American State Papers, Vol. VII, p. 53.

further lands were purchased in subsequent negotiations (or taken by conquest in a "just war") as directed and authorized by Congress (as by confirming a declaration of war or ratifying a subsequent treaty.) The underlying notion, therefore, is that the trust responsibility is a congressionally-sanctioned pledge of faith of the United States to guarantee Indian lands and protect the tribal entity from the assertion of State jurisdiction; in return, the tribe pledges loyalty to the United States and, as the century went on, allowed most of its land to be purchased.

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The premise upon which this relationship rested was that the Indians had some sort of legal title to the lands which they ceded. This had been established in an earlier opinion by Chief Justice Marshall, Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823). In Johnson, Marshall held that the Indians did have a sort of property right to lands which had been habitually used and occupied by them and that this right survived discovery of the American continent by European nations. Again relying upon the practice of the law of nations, Marshall concluded that Indians held "aboriginal Indian title" in the lands, and that discovery by European nations was subject to that possessory right. The Indians were entitled to possess the lands but could not convey them to private persons. They were, he stated, "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." 31/

Worcester is significant for an additional reason. In Cherokee Nation, Justices Johnson and Baldwin had concurred in the dismissal because, they reasoned, the Cherokees were not a "state." The concurring Justices analogized the tribe to a conquered domain, which had no territorial rights save at the pleasure of the conqueror. Justice Johnson analogized the tribe to a sort of tenant at will or tenant by sufferance on the lands secured by the treaty. 32/ The right of discovery, he maintained extinguished any property rights of the Indians; contrary to Johnson v. McIntosh, the tribes therefore had nothing to cede to the United States, and could be dispossesed will even of lands reserved by treaty. 33/

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31/ 21 U.S. (8 Wheat) at 574. Marshall based his doctrine "not on principles of abstract justice" id at 572, but the practice and policy of European nations. Id at 573-586.

32/ 30 U.S. at 27.

33/ Id at 22.

In *Worcester*, Marshall took considerable pains to refute this conception and to confirm the right of self-government in the tribe. He determined that the treaties were essentially ones of mutual obligations between more or less equal parties. 34/ As to the language that the Cherokees were to be "under the protection of the United States," Marshall concluded that this "protection" was restricted to the supplying and regulation of trade and "restraining the disorderly and licentious from instrusions into [Indian] country." 35/ Similarly, the Chief Justice declined to construe the article conferring upon Congress "the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, astthey think proper" as a "surrender of self-government." 36/

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34/ E.g. 31 U.S. at 551.

35/ *Id* at 552.

36/ *Id* at 553-54.

Rather, he held that "the great subject of the article is the Indian trade," 37/ and finally rejected the notion that by this article the Indians "considered themselves as surrendering to the United States the right to dictate their future cessions (of land), and the terms on which they should be made" or "to have divested themselves of the right of self-government on subjects not connected with trade." 38/

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37/ Id at 554.

38/ Ibid.

II. Twentieth Century Case Interpreting The Trust Relationship

The Marshallian conception, it is clear, did not annihilate conflicting views by prevailing in *Worcester*. There are several important reasons why this was so. First, the prohibitions in the Trade and Intercourse Acts against settler intrusion into Indian country could seldom be effectively enforced, and there was an obvious divergence between the treaty promises and actual performance. No solution which left the small Indian population in possession of more than half of the national territory could be acceptable to the militantly expansionist and more populous settlers. Rigorous enforcement of the Trade and Intercourse Acts and treaty guarantees was beyond the capacity of the frontier garrisons, and would probably have required a far more substantial military establishment.[39] Criminal prosecution of offenders under these statutes was infrequent, and extremely unpopular with frontier judges

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[39] Prucha, *American Indian Policy in the Formative Years*, p. 147, 162-63, 170-73 (1962).

and juries. 40/ Indeed, state and territorial district attorneys often arrested and prosecuted federal officers for enforcing these laws. 41/ In a sense, the inexorable push of the settlers westward created the first incidence of a Federal "conflict of interest" between a legal obligation to protect Indian lands and a felt political necessity to respond to settler pressures for expansion. The geographical results of the accommodations are well-known and require no discussion. The legal consequences are somewhat more interesting, if only because less obvious. For a time around 1900, it appeared that the courts would hold that the trust responsibility was not a legal obligation at all. Indeed, that had been the practice *de facto* since the 1830s--a decade which witnessed the statutory authorization and then implementation of the Jacksonian policy of removing virtually all eastern Indian tribes to the west of the Mississippi. Court decisions involving Indians in the last two-thirds of the nineteenth century generally ignored

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40/ *E.g.*, *Prucha*, 162-64, 170, 199-200.

41/ *E.g.*, *Prucha*, p. 170, 182.

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Worcester; a few state courts simply rejected it, seemingly claiming some power of nullification. 42/ Several cases near the turn of the century could be read as suggesting the view repudiated in Worcester: that the Indians were really a "conquered" people subject to the absolute (from a legal standpoint) will of the conqueror. Under this conception, the trust responsibility recedes as a legal limitation on Federal power and becomes a shorthand justification or convenient rubric for the exercise of federal administrative powers to "civilize" the aboriginal occupants of the continent or "rehabilitate" the "conquered peoples."

There is no doubt that, historically, this view had predominance in the decades on either side of 1900, and that it spilled over into the case law of that period. These cases, therefore, will be discussed. But a subsequent line of cases represents a confirmation of the more classical, Marshallian trust responsibility as creating federal administrative obligations legally binding at least upon the executive branch.

42/ See particularly State v. Foreman, 16 Tenn. 256 (1835) See also United States v. Cisna, Fed. Cas. 422 (No. 14,795) (C.C. D. Ohio 1835); United States v. Bailey, 24 Fed. Cas. 937 (No. 14,495) (C.C. Tenn. 1834); Murch v. Tomer, 21 Me 535 (1852).

A. Cases Holding That the Trust Responsibility Creates Federal Power Over Indians.

The Federal trust responsibility came, in the late nineteenth century, to be seen as something of an extra-constitutional source of federal power, apart from the express power in the constitution. This is particularly clear from Kagama v. United States, 43/ Kagama concerned the constitutionality of the Seven Major Crimes Act, 44/ enacted by Congress in 1885 to apply to all Indian reservations. Prior to that date, federal criminal law did not extend to Indians committing crimes against other Indians in Indian country. Kagama, an Indian arrested and prosecuted under the Major Crimes Act for murdering another Indian on the Hoopa Valley Reservation in California, challenged the constitutionality of the statute. The Supreme Court agreed with his contention that Article I, Section 3, Clause 8--which confers upon Congress the express power "to regulate

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43/ 23 Stat. 362, 385 (1885), 18 U.S.C. §1153.

44/ 118 U.S. 375 (1886).

Commerce with the Indian Tribes"--did not authorize enforcement of a federal criminal code on Indian reservations. But the Court nonetheless sustained the constitutionality of the statute by relying on the government's fiduciary relationship to the Indians. The Court fixed the "resemblance" perceived by Marshall in Cherokee Nation into a mirror image by holding that "these Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness. . .there arises the duty of protection and with it the power." 45/ (emphasis in original)

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The important difference between Marshall's decisions and Kagama was the reliance of the Court in Kagama upon the guardianship as a justification for federal power rather than a source of judicially enforcible duties. Kagama itself does not confer upon or recognize unlimited power in Congress. The holding may simply stand for the proposition that Congress possesses an inherent power to legislate for Indian tribes similar in extent to the power of a state legislature over its citizens. The Court suggested that power to enact the criminal statute "must exist in the

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45/ Id at 383-84.

national government," because it "can be found nowhere else." Worcester had precluded state jurisdiction over Indian reservations, and, as the Court reasoned in Kagama, the reservations "are within the geographical limits of the United States." Implicitly rejecting the notion that a tribe might be entirely self-governing, the Court held that the federal Congress must have at least those powers over Indian country which a state legislature would have over non-Indian citizens. In this sense, Indian country becomes analogous to a territory prior to statehood.

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Subsequent cases, however, made it clear that Congress has a more extensive power over Indians than state legislatures over their citizens. Statutes granting easements 46/ and leases 47/ over Indians lands without tribal consent were sustained in the decades following Kagama, as were the constitutionality of statutes like the Trade and Intercourse Acts which prevented sale of Indian property without approval by the Secretary of the Interior. The basis for these decisions was that the Indians were "in a condition of

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46/ Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 295 (1890).

47/ Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

pupilage or dependency, and subject to the paramount authority of the United States" 48/ as guardian. Standing alo these cases may stand for the proposition that Congress can do whatever it wishes with Indian property, so long as there exists some conceivable justification in terms of "civilizing" the Indians. In result, although not in reasoning, these cases are like the view of the minority justices in the Cherokee cases, with one important difference-- they sustain federal but not state power to control Indians and their property.

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Probably the definitive case of this period in terms of federal power was *Lone Wolf* v. *Hitchcock* 49/ which declared that Congress had a "plenary" power deriving from the guardianship to manage Indian property. 50/ In *Lone Wolf* Congress had enacted a statute which allotted tribally owned reservation lands to individual Kiowas and Comanches, and authorized the sale of unallotted lands on the

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48/ *Id* at 305.

49/ 187 U.S. 553 (1902).

50/ *Id* at 565.

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reservation to non-Indians. The Indians sued to enjoin enforcement of the allotment statute because it conflicted with terms of their 1867 treaty that expressly prohibited any cession of reservation lands without consent of three-quarters of the tribal members. Such consent admittedly had not been obtained. The Supreme Court held that "as with treaties made with foreign nations, . . . the legislative power might pass laws in conflict with treaties made with the Indians." The Court stated that the treaty could not operate "to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and. . .deprive Congress, in a possible emergency. . .of all power to act, if the assent of the Indians could not be obtained." 51/ Lone Wolf thus limits the security of the treaty pledges and the trust responsibility itself. These can be unilaterally abrogated by Congress even if it has previously promised to do so.

Accordingly, the trust responsibility may not operate as a legal limitation upon the power of Congress over

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51/ 187 U.S. at 564.

Indian affairs and property. 52/ As to Congress, the trust responsibility may simply be a moral duty. Congress evidently can change the purposes of the trusteeship, redistribute tribal property into individual lands (as was done under the allotment act sustained as constitutional in Lone Wolf), even terminate the existence of the trust responsibility. By contrast, a number of cases subsequent to Lone Wolf establish that the power of executive officials is strictly limited by the trust responsibility and--absent clear congressional direction to act otherwise--the Secretary is required to adhere to fiduciary standards analogous to those binding an ordinary private fiduciary.

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52/ This congressional power is probably subject to constitutional limits. See discussion of Shoshone Tribe v. United States, infra.; and Chippewa Indians v. United States, 301 U.S. 358 (1937); United States v. Klamath & Moadoc Indians, 304 U.S. 119 (1938).

B. Cases using the trust responsibility as a limitation on Federal power

In the first modern day case to consider the guardianship as a limitation on federal power, Lane v. Pueblo of Santa Rosa, 53/, the Court held that a tribe might sue to enjoin the Secretary of the Interior from disposing of tribal lands under the general public land laws. The Court held that the plenary power of Congress described in Lone Wolf to regulat Indian lands for the benefit and protection of its wards "certainly. . . would not justify the defendants (The Secretary included) in treating the land of these Indians as public lands of the United States, and disposing of the same under the Public Land Laws." That, the Court observed, "would not be an exercise of the guardianship but an act of confiscation." 54/

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Shortly after Lane, in Cramer v. United States, 55/ the Court voided a federal land patent that had conveyed--nineteen years previously--lands occupied by Indians

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53/ 249 U.S. 110 (1919).

54/ 249 U.S. at 113.

55/ 261 U.S. 219 (1923).

to a railway. The Indians' occupancy of the lands was not protected by any treaty, executive order or statute, but the Court placed heavy emphasis on the trust responsibility and national policy protecting Indian occupancy as a basis for relief. 56/ This responsibility meant that the officials involved had no statutory authority 57/ to convey the lands. 58/

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A subsequent case to elaborate on the Court's observations concerning the trust responsibility in *Lane* and *Cramer* was

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56/ The Court observed:

> "unquestionably it has been the policy of the Federal government from the beginning to respect the Indian right of occupancy. . . ." 261 U.S. at 227.
>
> "To hold that. . .they acquired no possessory rights to which the government would accord protection would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation.
>
> "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." (261 U.S. at 229) (emphasis supplied.)

57/ 261 U.S. at 233-35.

58/ Prior to *Cramer* and *Lane*, and in a case involving a claim under a special jurisdictional statute authorizing an action to be brought in the Court of Claims, the Supreme Court had held that the United States had acted "clearly in violation of the trust" by opening reservation to settlement under the general land laws of the United States, and observed:

Footnote 58/ continued:

> "That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any less a violation of the trust. The resolutions, unlike the legislation sustained in (*Cherokee Nation* v. *Hitchcock*). . .were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert. . .an unqualified power of disposal over the Indian lands as the absolute property of the government."

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United States v. *Mille Lac Band of Chippewas*, 229 U.S. 498, 510-511 (1913). An accounting to the ward, in the form of payment monetary damages, was required. See also *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937) and *Chippewa Indians* v. *United States*, 301 U.S. 358 (1937).

United States v. Creek Nation. 59/ In this action the Court of Claims had awarded money damages pursuant to a special jurisdictional statute for the taking of land which had been excluded from the reservation and later sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The Supreme Court affirmed that portion of the decision, bottoming its holding on the federal guardianship:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. 60/

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The Court did not specify in Creek Nation what "limitations" do "inhere in such a guardianship." Referring to the precise facts before it, the Court held that the federal government may not "give the tribal lands to others, or. . . appropriate them to its own purposes, without rendering. . . just compensation." 61/ Such action clearly appears to violate "pertinent constitutional restrictions,"

59/ 295 U.S. 103 (1935).

60/ 295 U.S. at 109-110.

61/ Ibid.

such as the Due Process Clause. The Court also suggested that some limitations inhere in the federal guardianship, qua guardianship, without specifying precisely what those limitations might be.

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Lane, Cramer and Creek Nation appear to concern only the power of executive officials over Indian trust lands. The conveyances had been exclusively administrative, and had not been specifically sanctioned by Congress. Shoshone Tribe v. United States, 62/ decided two years after Creek Nation, addressed the question of whether the guardianship also limited congressional authority over Indian tribal property. Shoshone Tribe was commenced in the Court of Claims for money damages because of the settlement of another tribe, the Arapahoes, on the Wind River Reservation, which had been reserved exclusively for the Shoshones by treaty. Congress had subsequently authorized location of the Arapahoes upon the reservation by statutes enacted in the 1890s. 63/ Holding such statutes to be unlawful on the ground that they did not provide compensation to the Shoshones, Justice Cardozo relied upon Creek Nation. He cited

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62/ 299 U.S. 476 (1937).

63/ Id at 489-90.

Lone Wolf for the proposition that "power to control and manage the property and affairs of the Indians. . . for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty." But Justice Cardozo cited Creek Nation for the now familiar proposition that such power does not extend to giving tribal lands to others or misappropriating them, unless compensation is provided to the Indians," as had been done in the sale of their "surplus lands" in Lone Wolf. Tartly, Cardozo concluded that "spoliation is not management." 64/

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While the case law aside from Shoshone Tribe enforcing the trust responsibility upon Congress is sparse and confirms a broad congressional power to convert Indian trust property into money if such an intent is expressly provided, the cases are exacting in their scrutiny of executive conduct. The principle furnished by reading the Lone Wolf and Lane-Shoshone Tribe lines of cases together is that unless it has specifically provided otherwise, Congress intends strict compliance with the trust responsibility in the executive administration of Indian property. The four Supreme Court cases discussed above deal with a limited but important aspect of the trust responsibility--an obligation to protect Indian beneficial ownership of land.

64/ Id at 498.

Other modern "breach of trust" cases concern other aspects of the Secretary's fiduciary duties relating to Indian property. These later cases also confirm that the scope of these fiduciary duties are at least as strict as those of an ordinary, private fiduciary.

The first case to give any content to the scope of these fiduciary obligations is *Seminole Nation* v. *United States*, 65/ where the Court concluded that the government's "conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged *by the most exacting fiduciary standards*." 66/ *Seminole Nation* is an important case in defining the principles for this Department's dealings with tribal government. The case dealt with funds required by treaty to be distributed among tribal members. Federal officials had given the funds to a tribal council which the officials had reason to believe was corrupt, and would misappropriate them. This, the Court held, constituted a breach of trust.

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65/ 316 U.S. 286 (1942).

66/ *Id* at 297.

In a lower court decision two years after Seminole Nation, Menominee Tribe v. United States 67/, the court--applying an "orrdinary fiduciary" standard--declared that the United States had failed to fulfill its "duty to see that the property of the Indians was productive of a return to them somewhat comparable to the return which they would have received on (privately invested) trust funds." More recently, in Manchester Band of Pomo Indians v. United States, 68/ a federal district court held that officials of this Department had violated their trust obligations by failing to invest tribal funds in non-treasury accounts bearing higher interest than was paid by treasury accounts. The court held that the government had breached its trust obligations in two respects: (1) by failing to pay any interest on various tribal funds on deposit in the Treasury prior to 1956; and (2) although some interest was paid on the funds after 1956, by failing to invest those funds in other, non-treasury accounts bearing higher interest. The court held that the practice by the trustee of borrowing the Indians' funds (by depositing them in theTTreasury) was not *per se* invalid as involving a prohibited conflict of interest. 69/

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67/ 101 Ct. Cls 10, 19 (1944).

68/ 363 F. Supp 1238 (N.D. Cal., 1973).

69/ Courts have not uniformly held it unlawful *per se* for a trustee to borrow funds from a beneficiary, A.Scott, Law of Trusts, p 1358 (3d Ed. 1967).

But it determined that the trustee was obligated to make the property productive of income and to choose another investment yielding a higher return if that investment was authorized by law for Indian trust funds and was appropriate for a reasonably prudent trustee.

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Menominee Tribe and Manchester Band concern a duty to make trust property income productive. Another recent case, Navajo Tribe v. United States, 70/ involves a breach of the fiduciary duty of loyalty. During the second World War, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium bearing, non-combustible gas which it had no desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau developed and produced the helium under the terms of the assigned lease instead of negotiating a new, more renumerative lease with the tribe. The Court held this action unlawful, stating that

> "The case is somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself."

Another recent lower court case giving shape and content to the fiduciary duty of loyalty is Pyramid Lake

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70/ 364 F. 2d 320 (Ct. Cl. 1966).

71/ Id at 324.

Paiute Tribe v. *Morton*, 72/ where the court enjoined the Secretary's authorization of certain water diversions from the Truckee River by a federal dam and reclamation project. The River was the sole source of water for Pyramid Lake. The lake itself is the chief asset of the tribe, whose reservation forms a circle around it. The diversions increased the lake's salinity and imperiled its fishery, upon which tribal members relied for subsistence and livelihood. The Court based its grant of injunctive relief on violations of the federal trust responsibility. In allocating waters between the federal propject and the lake, the Secretary had made a "judgment call," a balancing of interests which split the water between conflicting claimants that "all sides could hopefully live with." As trustee, the Court held the Secretary had a stricter obligation to the Indians than to the non-Indian waters users. Except as specifically limited by statute or contract, the Secretary was required to deliver sufficient water to preserve the level of the lake and maintain its fishery.

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72/ 354 F. Supp 252 (D.D.C. 1973).

These trust duties are not rigid or absolute. In a decision last term, United States v. Mason, 73/ the Supreme Court held that the United States as trustee has some discretion to exercise reasonable judgment in choosing between alternative courses of action. In Mason, Osage allottees brought suit claiming that officials of this Department should have protested state estate tax assessments on their trust properties. The taxes had been paid without challenge by Bureau officials in reliance on an earlier Supreme Court decision 74/ which had sustained the particular taxes in question. With some plausibility, however, the allottees claimed that subsequent Supreme Court decisions had eroded the vitality of the earlier case. The Supreme Court determined that the trustee had acted properly and reasonably by paying the taxes without protest. Mason, read together with cases such as Pyramid Lake, indicates that in situations where there is no suggestion that any conflicting interests have detracted from the trustee's exclusive loyalty to the Indians' interests, the trustee's reasonable judgments will be sustained. But the cases teach that the interest

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73/ 412 U.S. 391 (1973).

74/ West v. Oklahoma Tax Commission 334 U.S. 717 (1948).

of the beneficiary must be paramount, and the fiduciary duty of loyalty must be strictly observed. The case law dictates that the Indians' interests cannot be subordinated to other public purposes, unless Congress has clearly ordered the subordination. This principle is particularly clear in the Pyramid Lake case where the court rejected an accommodation of public interests and trust obligations and held that the Secretary as trustee for Indian property rights had a higher obligation to protect those rights than to advance the ends of other public projects within his charge. This duty would seem to flow from the duty of loyalty: the trustee has an obligation to order his own activities so as not to injure the property rights of his beneficiaries. The obligation can be approached differently--from the duty to enforce reasonable claims of the beneficiary (rather than as an aspect of the duty of loyalty). The Secretary must resolve disputes between Indians and other agencies so as to give the Indian claim the maximum reasonable extent. To illustrate: if the Secretary is planning a reclamation project which will serve both Indian and non-Indian lands, he should supply water to the Indian lands with a priority limited only by the full satisfaction of their reasonable claims under Winters Doctrine and, perhaps, by the outer limits of financial feasibility for the project. More generally,

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if there is a reasonable probability that a public project will injure Indian trust property (and Congress had not specifically authorized the injury), the Secretary must act to forestall the interference with Indian trust rights. In a different context, Indian claims of entitlement must be supported wherever they are reasonable; they must be given the broadest reasonable ambit rather than the narrowest. Accordingly, technical disputes as to which there is a range of possible reasonable solutions (e.g., the measure of Winters Doctrine water rights) must be resolved at the edge of the spectrum most favorable to the Indians.

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Another principle which follows from this reading of the trust relationship is that affirmative action is required by the trustee to preserve trust property, particularly where inaction results in default of trust rights. The water rights area is a prime example. The Indians' rights to the use of water pursuant to cases like Winters v. United States 75/ and Arizona v. California 76/ is prior to any subsequent appropriations. But failure in the past of the trustee to assert or protect these rights, and to assist in construction of Indian irrigation projects, has led non-Indian ranchers and farmers to invest large sums in land

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75/ 207 U.S. 564 (1908).

76/ 373 U.S. 546, 601 (1963).

development in reliance on the seeming validity of their appropriations.[77] The trust obligation would appear to require the trustee both to take vigorous affirmative action to assert or defend these Winters Doctrine claims in litigation and to devote substantial resources toward assisting Indian tribes in putting their water rights to effective and practical use.

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The impact of these principles on public administration within this Department is far reaching, given the conflicting policy objectives of other Interior Bureaus and agencies. They indicate that the Department as a fiduciary must give precedence to reasonable Indian claims of entitlement--in the property rights area--over conflicting policy objectives of other agencies in all instances. Flexibility in policy formulation is preserved by the Lone Wolf doctrine which permits Congress to direct a taking or subordination of the otherwise paramount Indian interest.

Summarizing thus far, the administrative principles of the trust relationship, as furnished by the case law, would be as follows:

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[77] See Report of the National Water Commission, ch. 14 (1973). As the Report points out, the Secretary has helped finance those water developments through the Bureau of Reclamation.

1. The trust relationship attache to all Indian trust property: land (*Lane*, *Creek Nation*); minerals (*Navajo Tribe*); water (*Pyramid Lake*); trust funds (*Menominee Tribe*; *Manchester Band*;) and presumably to timber, and to hunting and fishing rights.

2. The Secretary's obligations are closely analogous to those of a private fiduciary. He has, beyond question, the duties to exercise reasonable care, skill and diligence in preserving tribal assets, protecting against waste or loss and producing income or other return from the property.

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3. The Secretary also has the duty of loyalty. Obviously, he cannot misappropriate trust assets to his own use or give them to others (*Lane*, *Creek Nation*). Moreover, the Secretary as trustee must so order his own activities as to avoid *even unintended* injury to the trust beneficiaries. He cannot pursue a policy (say reclamation) in such a way as to diminish trust assets (say Pyramid Lake). He must espouse the maximum reasonable claim of entitlement for Indian tribes, even against the interests of other bureaus within the Department and other federal agencies.

III. Non-Property Aspects of the Trust Responsibility

Most of this memorandum and all the breach of trust cases have concentrated on the property-related duties of the trust responsibility. The resulting "ordinary fiduciary" standards that emerge from the case law have a conservative bankers touch about them. This obscures another, more political aspect of the trust responsibility. In *Worcester v. Georgia*, 78/ the United States was considered to have secured a measure of self-government to the Cherokees. This may be the most important, although least enforcible, component of the trusteeship; the treaties and agreements that created it, and the statutes that protect it, give support to the concept that Indian tribes are "domestic dependent sovereigns" 79/ within the boundaries of the United States, entitled to a continuing self-governing status. The central purpose of the trust responsibility may be to honor that political guarantee. The property-related fiduciary standards may in this view be simply a means toward that ultimate end of creating for Indians a viable option to exist as a society, rural and land-based, within an increasingly metropolitan

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78/ 31 U.S. (6 Pet) 515 (1832), discussed *supra*, pp .

79/ CompareCCherokee *Nation* v. *Georgia*, 30 U.S. (5 Pet) 1, 17 (1831).

industrial nation. For if tribal government and society are to survive as separate entities, they must have some secure land base to function upon and govern, water to irrigate that land if the society is to raise crops or cattle, fish and game in the streams and plains to sustain members of the culture. These property rights are protected so as to secure a resource base for the separate Indian culture and society to exist apart from the mainstream. The conception that the dominant purpose of the trust responsibility is to preserve tribal government and society is not, aside from Worcester, explicitly enshrined in the case law concerning the trust responsibility. Even cases which--like Worcester--preclude state jurisdiction over Indian reservations do not ordinarily use the metaphor of the trust responsibility. Federal executive officials have not been enjoined from interferring with tribal self-government or held liable in money damages for past interferences. The reason for this is not difficult to fathom; courts are familiar with cases where a trustee is sued for breach of fiduciary duties, and judicial remedies are develored and available where relief is warranted; claims that a federal official has interferred with "tribal sovereignity" are more amorphous (from a legal standpoint), without any judicially enforceable standards, and are apt to involve questions more appropriate for a political forum. Yet the courts have shown recurring

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appreciation for the importance of tribal self-government, of fostering it and of protecting it from interference.[80]

There is, then, a conception that the heart of the trust responsibility is the guarantee as regards powers of self-government. Particularly the early treaties, taking the Indians "into the protection" of the United States, seem to have established a sort of "protectorate" status for the tribes. They were to surrender powers over foreign affairs and self-defense, and other areas explicitly preempted by Congress. Otherwise, the tribe was to govern the territory reserved by treaty or agreement to it. Such a conception of the trust responsibility, like the one in *Worcester*, rejects the presumption that the tribe is a sort of incompetent in "wardship" status, for it sees the tribe as a distinct political society capable of governing itself.

Consequently, I do not perceive the same logical conflict or inconsistency that some have seen between the trust responsibility and the "self-determination" concept of the

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[80] Compare *Williams* v. *Lee*, 358 U.S. 217, 220 (1958), where the Supreme Court, after considering cases where states had been allowed to exercise a limited jurisdiction in Indian country, concluded:

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"

President's 1970 Message. In my view, self-determination is the most basic element and underlying objective of the trust responsibility. 81/ To be sure, there may be conflicts in some instances between full "self-determination" and certain trust duties (e.g., an Indian tribe decides to lease its lands for a penny a year). But it is untenable, I believe, to regard self-determination as an "all or nothing" concept, an "either-or" proposition. No government--federal, state or tribal--possesses absolute self-determination. Nor does any branch or agency of government function without limits, checks and balances.

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The paramount teaching of the trust responsibility is that--unless tribal powers have been preempted or circumscribed by Congress (compare Lone Wolf and Kagama)--the Secretary's chief trust duty is to strengthen the powers of tribal governments over their territories. Of course, the Secretary obviously has great discretion in deciding how to do this, to select between methods and strategies of implementing his trust obligations. Case law does not furnish precise guidelines. But some of the non-property aspects of the trust responsibility can be sketched.

81/ See p , supra.

A. State Jurisdiction

One of the fiercest contests in Indian law and policy is presently over the jurisdiction of states in Indian country. Most Indian law decisions of the Supreme Court in the past two decades have concerned some aspects of this question. 82/ But court pronouncements have been inconsistent and unclear, leaving substantial room for conflicting and harmful judicial interpretation. 83/ At times, Congress has acted to confer a

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82/ *E.g.*, *Williams* v. *Lee*, 358 U.S. 217 (1958); *Village of Kake* v. *Egan*, 369 U.S. 60 (1962); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971); *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973).

83/ A detailed study of these inconsistencies ranges beyond scope of this memorandum. Compare, for example, *Williams* v. *Lee*, *supra*, with *Kennerly* v. *District Court of Montana*. Or compare *Village of Kake* v. *Egan*, *supra*, with *McClanahan* v. *Arizona Tax Commission*. On the basis of these decisions, Indian litigants have been denied access to state courts in claims against non-Indians, *McCrea* v. *Busch*, (No. 12589 (D., 4th Jud. D., Mont., Aug. 8, 1973); state juvenile rehabilitation facilities have been denied to Indians regardless of adjudication of delinquency in tribal court and in the lower state court acting pursuant to a delegation of authority from the tribe, *Blackwolf* v. *District Court*, 493, P. 2d 1293 (Mont., 1972); Indian access to a state Unsatisfied Judgment Fund has been jeopardized, *Gorneau* v. *Smith*, 207 N.W. 2d 256 (N.D., 1973); and at least one case has raised serious questions as to the eligibility of tribal Indians to state or country welfare benefits, County of *Beltrami* v. *County of Hennepin*, 119 N.W.2d 25 (Minn., 1963). A further example, though resolved favorably to the Indian applicant, is the case of *Grace Bad Bear* v. *Fall River County Subcommission for the Mentally Retarded*, Civil No. 322 (Cir., 7th Jud. Cir., S.D., 1973) in which Grace Bad Bear, an adult resident of the Pine Ridge reservation with a mentality of an 18 month old child, was admitted to the state mental hospital only after lengthy litigation.

limited jurisdiction on some states over Indian country. 84/ But it has seldom proceeded in a clear manner; its statutes also are subject to divergent interpretations. 85/ Because diversities in approach are possible, the Secretary, the Bureau and the Solicitor's Office have a considerable opportunity to propose solutions favorable to tribal authority on these questions.

As trustee, the Secretary has a responsibility to function as an advocate for tribal jurisdiction, and to resist attempts by states to assert their authority over Indian country. By the same token, the Secretary has a duty to advocate state responsibility in those cases where individual Indians are denied access to state courts or state services such as juvenile rehabilitation facilities and mental health care are denied to Indians on the basis of disclaimers of state

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84/ The principal such enactment is "Public Law 280," 18 U.S.C. §1162, 28 U.S.C. §1360.

85/ Compare Shohomish Country v. Seattle Disposal Co., 425 p. 2d 22 (Wash), cert denied. 389 U.S. 1016 (1967) with Rincon Band v. County of San Diego, 324 F. Supp 371 (S.D. Cal., 1971).

jurisdiction. 86/ This is an extremely technical problem and the exact strategies that could be devised are beyond the scope of this memorandum. But Secretarial actions should be considered in terms of their likely impact on tribal government and state jurisdiction. By encouraging non-Indian industries or residential communities to located on leased reservation lands, for example, the Department increases the likelihood that tribes will be deprived of authority to govern their reservations. 87/ This ought to be weighed by the trustee prior to approving such a lease, and the Indian lessor advised of the possible consequences.

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The central teaching of the trust responsibility, for present purposes, is not that state jurisdiction over Indians is per se bad. It has been argued that it acclimatizes reservation Indians to life in the dominant society, gently assimilates them, treats them "equally" with other citizens. But the danger is that the assimilation is forcible and conflicts with the trust responsibility to secure a protected status for tribal government that may berousted by assertions of state authority. State law, moreover, is corrosive

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86/ It would appear, however, that states are obligated to provide services to reservation Indians even if they do not have taxing authority or criminal and civil jurisdiction in Indian country. Acosta v. San Diego, 126 Cal. App. 2d 455, 272 P. 2d (1954). A strategy badly needs to be formulated in this regard by the Departm

87/ See, e.g., Aqua Calienta Band v. County of Riverside, 442 F. 2d 1164 (9th Cir. 1971), cert denied 405 U.S. 932 (1972).

Footnote 87 continued

For the cases that are more hospitable to state jurisdiction over non-Indians on reservations than over Indians compare Utah and Northern Ry. v. Fisher, 116 U.S. 28 (1885) and Thomas v. Gay, 169 U.S. 264 (1884) with McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).

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toward federally-protected rights. It seldom recognizes the water rights reserved under the Winters doctrine 88/ or special hunting and fishing rights protected by cases like *United States* v. *Winans*. 89/ If state law is preemptive, the tribal government loses much of its authority to rule its reservations and much of its federally-recognized proprietary entitlements. A separate paper is being prepared on this subject. However, in the interim, I would recommend that:

1. The Department should function exclusively as an advocate for tribal authority over Indian country;
2. The jurisdictional consequences of Departmental decisions ought carefully to be weighed, and the tribal clients advised of possible consequences.

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88/ Winters v. United States, 207 U.S. 564 (1908).

89/ 198 U.S. 371 (1905). See also *Tulee* v. *Washington* 315 U.S. 681 (1942).

B. Exercises of Administrative Powers by the Department

The most significant limitation on the effective functioning and nurturing of tribal self government is probably not the prospect of state jurisdiction. Rather, it would be the exercise of discretionary, governmental powers over Indian lands and affairs by this Department. The Secretary's statutory powers in Indian affairs are awesome. As a Harvard Law Review note stated a few years ago: 90/

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> "Although the nomel expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the nomel expectation on the reservation is that the Indian may not do anything unless it is specifically permitted by the government"

A reservation Indian cannot sell, 91/ lease 92/ or will 93/ or acquire 94/ trust property without approval by the Secretary. Contracts cannot be executed disposing of tribal funds--even attorneys cannot be hired to sue the government--without the Secretary's approval. 95/ Such statutes owe their origin to a more paternalistic, frankly colonial era, when the trust responsibility (as in *Lone Wolf* and *Kagama*) was seen more

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90/ Note, *The Indian*. *The Forgetten American*, 81 *Harv. Law Rev.* 1818, 1820 (1968).

91/ 25 U.S.C. §177. Allotments may be patented in fee to allottees, 25 U.S.C. §349, and then sold.

92/ 25 U.S.C. §415.

93/ 25 U.S.C. §373.

94/ 25 U.S.C. §465

95/ 25 U.S.C. §681 *et seq.*

as a source of complete federal power over Indians. 96/ The statutes themselves generally furnish few if any standards for the exercise of these prodigous approval powers. And generally they have been interpreted by the Department in a manner which leaves the Secretary to function as a kind of a "banker" trustee rather than a trustee with a sophisticated responsibility for preservation of Indian property and the nurturing of tribal self government.

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One example is in the approval of Indian leases. Our regulations provide that the chief prerequisite for approval of a lease is that it shall be for "the present fair annual rental." 97/ The BIA Manual is more explicit: it states that "the objective of the Bureau. . .in approving leases or permits on trust or restricted lands is for the Indian owners to get the maximum financial return from the land, consistent with sound utilization principles." 98/ This commits the Department to a narrow financial review function; the use of Indian lands by non-Indians, even for very long periods of time and for permanent types of uses (such as resort and residential communities), is

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96/ pp. , supra.

97/ 25 CFR §131.5(b).

98/ 54 Indian Affairs Manual Sec. 5.1.

presumptively good so long as the compensation paid is fair. Large residential leases have been approved at Palm Springs, at the Cochiti and Tesuque Pueblos. A series of strip mining leases and permits have been approved on the Northern Cheyenne Reservation. All of these leases commit a substantial portion of the reservations involved to non-Indian development and consequently limit significantly Indian use of the retained land.

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It is, of course, beyond the scope of this memorandum to suggest whether such leases are good or bad. But it is important to emphasize that little if any consideration was given to nonfinancial aspects of the trust responsibility when they were approved--whether an Indian culture could continue to exist on retained reservation lands, whether proximity of an Indian traditional culture (as with the Pueblos) to a large modern community would result in destruction or absorption of the Indian community, whether tribal government could continue to function in the context of such development, or whether the assertion of state jurisdiction over the reservation would reduce or atrophy tribal powers. Other "business" leases have been significant in terms of economic development for the reservations. Jobs have been produced, for example, by industrial leases on the Navajo

Reservation for electric power plants and electronics factories. But often the Department has been inattentive, as with residential leases, to the broader social ramifications of the lease. There has often been little planning to cushion the effects of industrial uses on the adjoining land and on tribal culture, to provide housing for tribal members employed by the industry, or to study and advise tribes of adverse environmental affects which may be produced by leasing.

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The same exclusively financial interpretation of trust duties exists in the regulations relating to sale of individual trust allotments. Allotments are sold if the "long range best interests" of the Indian owner is protected. 99/ Generally, this means that an appraised value is met, auctions or negotiations are held--in other words, a fair price is received. Limited attention is focused on the question of whether the sale will upset tribal land use patterns, further checkerboard reservations, or be consistent with Indian occupancy and continued tribal governmental authority over the reservation. 100/

99/ 25 C.F.R. §121.11.

100/ The regulations do allow the tribe a right of first refusal at the sale price with the allottee's consent.

There is, moreover, an inconsistency between the vastness of the administrative approval powers and "self-determination." In a recent decision, the Supreme Court set aside the Department's disapproval of a will where an allottee devised his trust property to his niece in preference to his natural daughter. 101/ The Department's disapproval was based on a determination that the decedent had ceased living with his wife shortly before his daughter's birth and thus deprived her of a "normal home life during her childhood." The Court was troubled by the subjective nature of the Department's decision and by the absence of regulations. At the very least, the case strongly indicates the need for regulations which state clearly the standards for exercise of the Secretary's discretion in approving and disapproving a will. More broadly, the decision raises the question of why the Secretary ought to have a broader power to disapprove wills than, say, a state probate court possesses with respect to the administration of estates. If such powers are to be exercised, should they be exercised by tribal governments rather than the Secretary? In

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101/ Tooahnippah v. Hickel, 397 U.S. 598 (1970).

similar vein, thought should be given as to whether and pursuant to what standards the Secretary should retain a power to approve tribal ordinances. It is doubtful that such a power, at least to the extent it vests open-ended discretion in the Secretary, is now exercised in a fashion consistent with the self-determination aspects of the trust responsibility.

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The questions raised in this section each merit far more extended thought and treatment than I have given them. My comments are suggestive rather than intended as definitive. There is a need for rethinking the exercise of traditional "governmental" powers over Indian land and reservation affairs in the light of a more delicate and limited conception of the trust responsibility with its purposes of furthering tribal self government and preserving Indian landholdings, as well as ensuring financial fairness. Regulations should be issued or policy statements formulated implementing the trust responsibility, structuring and limiting broad-gaged Secretarial discretion as it appears under these statutes. Additionally, the exercise of a veto power may be anachronistic in an age when tribal self government is to be featured. In leasing, for example, the Secretary might better function as a "counselor" to a tribe, a purveyor of technical information, (including the financial adequacy of the arrangement) without being vested with a formal veto power. The statutory and regulatory scheme of Indian leasing views the Indian as a "ward," a functional incompetent who needs federal protection against selling his birthright for a mess of pottage. At least in the case of tribally owned lands, a presumptive incompetence is empirically difficult to square with the greatly increased sophistication of tribal leadership. At least for short term leases, tribes ought to be able to plan the use of their land with the advice but not the consent of the Secretary. The tribe could be informed of environmental impacts, of the effect of the lease on its culture, of the financial aspects of the transaction, and the effect of the transaction on the functioning of tribal government and the use of retained tribal lands. The leasing of land could be an occasion for the Secretary to assist in tribal planning to meet changed circumstances caused by locating an industry or residential community on the reservation.

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In some respects, legislation would be required to accomplish these results. In leasing, for example, Congress has authorized the Tulalip Tribe to lease lands for fifteen years, one-term renewable, without the Secretary's approval. 102/

102/ 25 U.S.C. §415(b).

In other areas, the Secretary could accomplish the same outcome administratively--for example, by announing in advance that he would approve any will so long as formal requirements were met, or any tribal attorney contract where the fee was not clearly exorbitant. In such a manner, Departmental power and discretion could be limited and Byzantine administrative procedures avoided. If the Secretary's "governmental" type discretion under these approval powers were circumscribed, more departmental energies could be channeled into the counseling function. The Department could devote more of its efforts toward preservation of land ownership and protection of natural resources, into the strengthening of tribal government and limiting of state jurisdiction, into providing technical services not readily available to the tribe and into informing the Indian trust beneficiaries as to the probable outcomes and impacts of particular actions. The trust relationship could be restructured along more modern, consensual lines: a fiduciary relationship between adults (attorney-client, physician-patient) rather than between a parent-guardian and its incompetent child-ward.

DRAFT

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In reply please quote our file reference number

December 3,1987

Senator Daniel Ken Inouye
Room SH-838
Select Committee On Indian Affairs
Washington, D.C.
20510

Senator Daniel Ken Inouye:

I had the privilege to be in attendance on the hearing Dec. 2, 1987 on Indian Affairs. I was really impressed with your interest on the Native People of North America. Although my ancestors came to Canada 148 years ago, I have always felt at home in the United States. In fact, my two sons were born in the State of New York. I have lived in the United States for 15 years and served the United States Army in Germany for 3 years.

Enclosed for your perusal is a booklet that highlights the Oneida Nations role in American History. Oneida people feel honoured to have you as Chairman on the committee of Indian Affairs and trust that you will continue to take great interest.

Sincerely,

Raymond George
Oneida Land Claim Representative

Introduction

In 1840, the Oneida people lost the last acre of land they owned in Central New York. The hardships and pressures that the Oneida Tribe had to endure forced them to settle in Canada in an area located 20 miles southwest of London, Ontario. Although this has been home to the Oneidas since 1840, many of the Oneida families have moved to cities in the United States to find employment. Oneida forefathers have tried since that time to be compensated for the six million acres which was known as Oneida Territory. Oneida people have donated thousands of dollars to support their belief that one day justice will be done. Some even sold their farms and property located in Canada to support this cause.

In spite of all the obstacles, the Oneida's claim finally reached the courts in 1970. At that time, the Supreme Court of the United States recognized that injustice has been done.

In March 1985, the United States Supreme Court affirmed the lower court's decision to grant to the Oneida Nation possessory rights to land claimed in their post-1970 suit. September 1986 marked the beginning of negotiations between the State of New York, the United States Government and the Oneida Nation. Settlement [illegible] this 150-year-old claim is imminent.

THE FAITHFUL ALLIES

Recently, the Oneida people learned that the U.S. Congress wanted to compensate the American Japanese for the injustice suffered during the Second World War. It is encouraging to see that Congress is trying to rectify the wrong doing to these people, especially during the U.S. Bi-centennial year. But let it not be forgotten that there is another people to whom a great injustice has been committed and yet has never been addressed.

In order to present a clearer picture of what occurred, let us look back into history. The Oneida Nation Tribe of Indians were once a great Nation originating from central New York State. The Oneida Nation is and was part of the Iroquois Confederacy, also known as the Six Nations, consisting of the Seneca, Cayuga, Onondaga, Mohawk, Tuscarora and Oneida. The Iroquois Confederacy was the most powerful alliance of Indians east of the Mississippi. The original boundaries of the Oneida's homeland stretched from the Pennsylvania State border, east to Binghamton and Syracuse, north to the St. Lawrence River, approximately 50 miles wide, encompassing about 6 million acres.

When the Revolutionary War broke out, the Six Tribes could not agree on a united position--whether to support Great Britain or the United States. Thus, in 1777, the Grand Council fire was put out allowing each Tribe to go its own way. The Oneidas and Tuscaroras chose to ally themselves with the United States. By the end of 1777, it was clear that the Six Nation Tribes of New York were divided and in conflict with each other. It was also clear that the United States and the Oneidas had established a special relationship as allies to one another. The Oneida Country was devastated by the Revolutionary War and suffered heavy casualties to their warriors, women and children. In spite of all this, the Oneidas remained loyal to the United States throughout the war.

Throughout this period, the United States Congress at that time, had nothing but praise and assurance for the Oneidas. The United States acknowledged its obligation to protect the Oneidas and considered their welfare as their own.

In 1784, the Treaty of Fort Stanwix was signed. It stated that special and preferential treatment would be afforded to the Oneidas and Tuscaroras, allies of the United States. The Treaty of Fort Stanwix was also a peace treaty between the other four members of the Six Nation Confederacy. It is clear that the Congress distinguished the Oneidas as allies and directed they be treated differently. Unlike their Iroquois brethren, they were not expected to make any land cessions; in fact, they were guaranteed the right of sole occupancy. Article 2 was to protect and provide for the Oneidas and Tuscaroras. It stated that "The Oneida and

Tuscarora Nation shall be secured in the possession of the land on which they are settled; and that no land transactions would be valid unless they are approved by Congress". The commissioner explained this provision by saying, "It does not become the United States to forget those nations who preserved their faith to them and adhered to their cause." Those therefore must be secured in the full and free enjoyment of those possessions. According to this treaty, the United States extended a specific assurance to the Oneidas for the integrity of their territory.

The Oneida people always thought very highly of George Washington. Washington expressed his gratitude by visiting the Iroquois territory in 1783. Once again, at a conference held at Albany with Commissioner Schuyler, the Oneidas and Tuscaroras were assured of the "esteem of the United States." Washington in a letter to Phillip Schuyler expressed a similar sentiment. "The Oneidas and Tuscaroras", he wrote, "have a particular claim to attention and kindness, for their perseverance and fidelity" (The Writing of George Washington from the Original Manuscript Sources 2:390, JC-22).

The Oneidas fought bravely throughout the American Revolution, yet there is no mention of their struggles in America's written history. During the battle at Valley Forge, American troops were starving. It was the Oneidas who shared their food with these soldiers, even at the risk of starving their own women and children.

Let us also remember the contribution that the Oneida warriors have made in recent years, such as in World War I, World War II, Korea, Vietnam and the wars in between. All these wars and conflicts have been fought with Oneida men serving in the United States military...fighting and dying for the United States cause of freedom. There are names; there are stories; there are Oneida lives which have been lost in all the wars the United States have been engaged in, past and present. What do Oneida people have to show for being so faithful to a Nation they believe in? "A lost but not forgotten homeland." After the Revolutionary War, Oneida lost their land which was affirmed and reaffirmed and endorsed by the highest government of the land, the Continental Congress of the United States.

The Oneida people would very much appreciate any input the United States Congress can give us in our struggle to have rectified the wrongs and injustices done to the Oneida people. Our quest is for adequate compensation for the unselfish contributions the Oneidas have made to the United States in becoming the great country it is. Please help us in our struggle to be treated as valued allies, not as conquered foes.

Raymond George
Land Claims Representative
ONEIDA NATION OF THE THAMES
October 16, 1987

RECEIVED
JUL 16 1986

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COUNTY OF ONEIDA, NEW YORK, ET AL. *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 83–1065. Argued October 1, 1984—Decided March 4, 1985 *

Respondent Indian Tribes (hereafter respondents) brought an action in Federal District Court against petitioner counties (hereafter petitioners), alleging that respondents' ancestors conveyed tribal land to New York State under a 1795 agreement that violated the Nonintercourse Act of 1793—which provided that no person or entity could purchase Indian land without the Federal Government's approval—and that thus the transaction was void. Respondents sought damages representing the fair rental value, for a specified 2-year period, of that part of the land presently occupied by petitioners. The District Court found petitioners liable for wrongful possession of the land in violation of the 1793 Act, awarded respondents damages, and held that New York, a third-party defendant brought into the case by petitioners' cross-claim, must indemnify petitioners for the damages owed to respondents. The Court of Appeals affirmed the liability and indemnification rulings, but remanded for further proceedings on the amount of damages.

Held:

1. Respondents have a federal common-law right of action for violation of their possessory rights. Pp. 5–12.

(a) The possessory rights claimed by respondents are federal rights to the lands at issue. *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 671. It has been implicitly assumed that Indians have a federal common-law right to sue to enforce their aboriginal land rights, and their right of occupancy need not be based on a treaty, statute, or other Government action. Pp. 6–8.

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*Together with No. 83–1240, *New York* v. *Oneida Indian Nation of New York State et al.*, also on certiorari to the same court.

(b) Respondents' federal common-law right of action was not pre-empted by the Nonintercourse Acts. In determining whether a federal statute pre-empts common-law causes of action, the relevant inquiry is whether the statute speaks directly to the question otherwise answered by federal common law. Here, the 1793 Act did not speak directly to the question of remedies for unlawful conveyances of Indian land, and there is no indication in the legislative history that Congress intended to pre-empt common-law remedies. *Milwaukee* v. *Illinois*, 451 U. S. 304, distinguished. And Congress' actions subsequent to the 1793 Act and later versions thereof demonstrate that the Acts did not pre-empt common-law remedies. Pp. 8–12.

2. There's no merit to any of petitioners' alleged defenses. Pp. 12–22.

(a) Where, as here, there is no controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action will be borrowed and applied to the federal action, provided that application of the state statute would not be inconsistent with underlying federal policies. In this litigation, the borrowing of a state limitations period would be inconsistent with the federal policy against the application of state statutes of limitations in the context of Indian claims. Pp. 12–16.

(b) This Court will not reach the issue of whether respondents' claims are barred by laches, where the defense was unsuccessfully asserted at trial but not reasserted on appeal and thus not ruled upon by the Court of Appeals. Pp. 16–17.

(c) Respondents' cause of action did not abate when the 1793 Act expired. That Act merely codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*. All subsequent versions of the Act contain substantially the same restraint on alienation of Indian lands. Pp. 17–18.

(d) In view of the principles that treaties with Indians should be construed liberally in favor of the Indians, and that congressional intent to extinguish Indian title must be plain and unambiguous and will not be lightly implied, the 1798 and 1802 Treaties in which respondents ceded additional land to New York are not sufficient to show that the United States ratified New York's unlawful purchase of the land in question. Pp. 18–20.

(e) Nor are respondents' claims barred by the political question doctrine. Congress' constitutional authority over Indian affairs does not render the claims nonjusticiable, and, *a fortiori*, Congress' delegation of authority to the President does not do so either. Nor have petitioners shown any convincing reasons for thinking that there is a need for "unquestioning adherence" to the Commissioner of Indian Affairs' declining

COUNTY OF ONEIDA, NEW YORK, et al., Petitioners

v

ONEIDA INDIAN NATION OF NEW YORK STATE, etc., et al.

NEW YORK, Petitioner

v

ONEIDA INDIAN NATION OF NEW YORK STATE, etc., et al.

470 US —, 84 L Ed 2d 169, 106 S Ct —

[Nos. 83–1065 and 83–1240]

Argued October 1, 1984. Decided March 4, 1985.

Decision: Oneida Indian Tribes held to have federal common-law cause of action for the occupation and use by counties of tribal land conveyed to state in 1795 in violation of the Nonintercourse Act of 1793.

SUMMARY

Tribes of the Oneida Indians brought suit in 1970 against the Counties of Oneida and Madison, New York, in the United States District Court for the Northern District of New York, seeking damages representing the fair rental value of that part of the counties that the Tribes sold to the state in 1795, allegedly without the consent of the United States in violation of the Trade and Intercourse Act of 1793 (1 Stat 329). After the District Court dismissed the action on the ground that the complaint failed to state a claim under federal law, and the United States Court of Appeals for the Second Circuit affirmed (464 F2d 916), the United States Supreme Court granted certiorari and reversed, holding that, at least for jurisdictional purposes, the Tribes stated a claim for possession under federal law (414 US 661). On remand, the District Court trifurcated trial of the issues; in the first phase, it found the counties liable for wrongful possession (434 F Supp 527), in the second phase, it awarded the Tribes damages, and in the final phase, it held that third-party defendant state of New York must indemnify the counties. The Court of Appeals affirmed the District Court's ruling with

APPENDIX B.

UNITED STATES TREATIES.

ARTICLES CONCLUDED AT FORT STANWIX, ON THE TWENTY-SECOND DAY OF OCTOBER, 1784, BETWEEN OLIVER WOLCOTT, RICHARD BUTLER AND ARTHUR LEE, COMMISSIONERS PLENIPOTENTIARY FROM THE UNITED STATES IN CONGRESS ASSEMBLED, ON THE ONE PART, AND THE SACHEMS AND WARRIORS OF THE SIX NATIONS ON THE OTHER.

The United States of America give peace to the Senecas, Mohawks, Onondagas and Cayugas, and receives them into their protection upon the following conditions:

Article 1. Six hostages shall be immediately delivered to the commissioners by the said nations to remain in the possession of the United States, till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas and Cayugas, or by any of them in the late war, from among the people of the United States, shall be delivered up.

Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of the lands on which they are settled.

Article 3. A line shall be drawn beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's landing place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying path between Lakes Erie and Ontario, to the mouth of Tehoseroron, or Buffalo creek, on Lake Erie; thence south to the north boundary of the State of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said State to the river Ohio; the said line from the mouth of the Oyonwayea to the Ohio shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego to the United States for the support of the same.

Article 4. The commissioners of the United States, on consideration of the present circumstances of the Six Nations, and in execution of

Conclusion

It is clear that the Oneidas had a special relationship with the United States during the American Revolution. The Oneidas remained loyal throughout the war and took an active part in the hostilities. As a result, they found themselves alienated from the Onondagas, Cayugas, Seneca, and Mohawk tribes. Their villages were destroyed and they were forced to leave their territory temporarily. For its part, the United States assumed a responsibility to protect the Oneidas and to see that they were returned to the possession of their lands and that they were secure and prosperous.

The Treaty of Fort Stanwix of 1784 was held in order to end hostilities between the United States and its Indian allies (the Oneidas, Tuscaroras and others) on the one hand, and the four hostile tribes (the Seneca, Cayuga, Onondaga, and Mohawk) on the other; to acquire a land surrender from the Seneca; and to establish a boundary between the United States and the Iroquois tribes. At the signing of treaty, the United States Indian Commissioners informed the Oneidas, along with the other tribes present, that New York State had no right to negotiate for land with them without the consent of Congress.

In the treaty itself, the United States extended a specific assurance to the Oneidas as to the integrity of their territory. This position was supported by the explanation given by the commissioners when they said "It does not become the United States to forget those nations who preserved their faith to them, and adhered to their cause; those, therefore must be secured in the full and free enjoyment of those possessions" (Olden Time 1848, JC-50). It is further reinforced by the fact that Arthur Lee, one of the United States commissioners, was also a member of the committee that drafted the October 15, 1783 report to the Congress. As such, he was well aware of the desire of New York to push the Oneidas west and expel the other Iroquois tribes. He understood fully the possible ramifications of such a policy. In view of Lee's knowledge and background it is reasonable to assume that Article 2 of the Treaty was meant to secure Oneida lands against interference by the states and individuals, as well as by tribes and their foreign allies.

Other evidence confirms that interpretation. One source is a letter from Samuel Hardy, Virginia delegate to the Congress, to the Governor of Virginia, written shortly after Commissioner Wolcott had delivered the treaty to Congress. Hardy reported that the commissioners "...have guaranteed to the Six Nations all their land within the state of New York with certain exceptions (Burnett 7: 614, JC-54). Further evidence that Congress understood a "confirmation" or "guarantee" of Indian lands to include protection against whites, not simply against other Indians, may be found in the address by David Ramsay, Chairman of Congrses to a visiting delegation of Indians. He stated:

> You may assure your Nation and all the Indian Nations that what the Commissioners of the United States have told you is true, and that all the treaties lately made with them were made by order of Congress; and that the Congress will faithfully keep their engagements as specified in the treaties...
>
> The United States will take care that none of their citizens shall intrude upon the Indians within the bounds which in the late Treaties were allotted for them to hunt and live upon..(30 JCC: 235-236, JC-55)

Further evidence of this is found in the instructions in a committee report, dated October 4, 1785, that should Congress appoint an agent for the Six Nations he is to be instructed "...to inform the Oneidas and also the Cayogon Chiefs, that Congress will preserve inviolate the Treaty of Fort Stanwix, ...and that the Reservations in that Treaty in favour of any of the said Tribes will be at all times faithfully regarded by Congress" (29 JCC: 806, JC-56).

Finally, the Treaty gives support to the view that the Oneidas and the other Iroquois tribes were recognized as independent Indian nations outside the authority and control fo the State of New York. There is evidence to suggest that they were outside the boundaries of the state as well. It is interesting to note that the land ceded by the Seneca to the United States was within the boundaries of what is now the State of New York.

file: Found 8/26/87

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Remarks prepared for hearings
Senate Bill 76
Senate Select Committee on Indian Affairs
December 2, 1987

How I wish I could be with you today, as American Indian contributions to democracy make their way into the official record of the government these precious ideas helped shape.

Because of teaching obligations in Omaha (we are in the mad dash to finals), I will be with you in spirit, continuing to ply a trial of ideas that began, for me, in the middle 1970s, and produced a book: Forgotten Founders: How the American Indian Helped Shape Democracy (Boston: Harvard Common Press, 1982 and 1987).

It is a wonderful honor to be able to address this committee in such distinguished company. How wonderful it is, as well, to see the idea of Indian contributions aired in the forum of the United States Senate -- that "younger brother" of a

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deliberative body to the Iroquois' great council fire at Onondaga.

The idea of Indian influences is not new, of course. During the research for my book, I had the opportunity to read nearly everything Benjamin Franklin and Thomas Jefferson wrote. The idea was often in their minds. The idea was common intellectual currency among our founders.

As an history, the idea begins to resurface in the 1850s. It rises and falls in public consciousness over time. Just last weekend I was invited to Colorado Springs to discuss the book, and David Griffith, a trial lawyer who had invited me there also showed me an entry in the 1904 Encyclopedia Americana on Iroquois government, addressing this very subject.

How encouraging it is to see the celebration of our Constitution's bicentennmial again make the idea of American Indian contributions part of our "national civics lesson." Encouraging, and timely. Or, should I say: it's about time -- again. This time, I hope the idea will become firmly rooted in our national consciousness -- in our public discourse, in our school curricula, in our academic discussions, from coast to coast. What the Iroquois and other native confderacies taught us has helped make us what we are. These are profoundly important ideas that bear on how dearly we all hold our liberty, personal freedoms, and respect for those of others.

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Our histories give nearly full credit to European precedents, such as the Magna Charta. These were very important, of course, but we also owe an intellectual debt to American antecedents. We can appreciate our European origins without ignoring what it is in America that makes us who we are. While I can't compress a book into a few short remarks, I'd like to give a sense of the subject -- not for the professional scholar, but for everyone to whom democracy and liberty are precious.

* * *

These indigenous threads were woven into our revolutionary tapestry at a time when less than three million people of European descent lived in small "islands" of settlement among more widespread, and numerous, American Indian nations, many of which goverened themselves through confederacies which greatly resembled our own, especially in its earlier form under the Articles of Confederation. The United States' founders also drew freely on the image of the American Indian as an exemplar of the spirit of liberty they so cherished.

Long before Uncle Sam came along, the Indian was used as a symbol of independent American identity. The rebels who dumped British tea in Boston harbor picked their disguise as Mohawks with great care -- the symbol of a new American identity versus the tea, symbolizing British tyranny. And they sang:

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Rally Mohawks, and bring your axes
And tell King George we'll pay no taxes
on his foreign tea.

As early as 1736, Benjamin Franklin was printing accounts of treaties with Indian nations on his Philadelphia press. In the America of his day, these were major diplomatic events. In 1744, Franklin published the Lancaster treaty, in which the Iroquois sachem Canassatego urged the colonists to unite in federal union as had his own ancestors.

"Our wise forefathers established union and amity between the Five Nations," Canassatego told colonial delegates. "This has made us formidable. This has given us great weight and authority with our neighboring Nations. We are a powerful Confederacy, and by your oberving the same methods our wise forefathers have taken you will acquire much strength and power; therefore, whatever befalls you, do not fall out with one another."

Franklin was picking up same theme around 1750 when, writing to his New York City printing partner James Parker, he placed the following satirical gauntlet before the colonists:

"It would be a very strange thing if Six Nations of ignorant savages should be capable of forming a scheme for such an Union and be able to execute it in such a manner that it has

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subsisted ages, and appears indissoluble, and yet a like union should be impracticable for ten or a dozen English colonies."

Franklin spearheaded the Albany Conference of 1754, which brought colonial delegates together to discuss his plan for union, a loose confederacy resembling the Iroquois system in some ways, and European precedents in others. The Mohawk sachem Tiyanoga (Hendrick to the British) was invited to the conference especially to brief the delegates on the Iroquois political system, which is outlined in the Six Nations' Great Law of Peace, which today still functions in upstate New York and nearby regions of Canada as the oldest surviving constitution on the continent.

The Iroquois Great Law also was a written document, preserved on wampum belts of great antiquity, which aided the recall of sachems in council. Many other native American societies governed themselves through confederacies as well. The Cherokees and Choctaws to the south, the New England Indian nations to the east and north: the European immigrants were surrounded by examples of democracies that Europe's written records only recollected through books. The Greek city-states, the Roman Republic and the mythical democracies of the Celts and Germans were but hazy memories to the Europeans becoming Americans. The evidence of the republican form of government they sought existed before their eyes, on American soil.

⑥

The colonies' assemblies rejected the Albany plan, but many of its provisions reappeared in Franklin's drafts of the Articles of Confederation. The basic concept of balancing powers and a federal system lived on in the Constitution, a system meant to bind peoples who wanted to preserve their own autonomy in local matters, an ideal form of government for colonies which differed in many respects, spread over a geographical area that was enormous to European eyes at that time.

When I make a case for native American influence on our political institutions, I find it best to use "constitution" with a small "c," since we are dealing here not only with specific actions that produced specific documents, but within the powerful realm of ideas. It tells us much more to trace the traits of character which molded our national identity in those early years, and which made the Constitution possible.

One of the early Americans' character traits was a passion for liberty -- a theme in which the Indian was often used an an exemplar vis a vis monarchial Europe. Franklin was the best example of this, but Thomas Jefferson remarked on it as well. Writing to Edward Carrington in 1787, Jefferson said:

"I am convinced that those societies [as the Indians]...enjoy in their general mass an infinitely greater degree of happiness than those who live under European governments."

(7)

Franklin and Jefferson saw in the native societies that surrounded the colonies what they believed to be a window on their own peoples' pre-monarchial past. The Celtic tribes often were mentioned as being as democratic as the Indians. The Iroquois often were compared to the Romans under their Republic, as well as to the Greeks.

Comments on the democratic essence of American Indian polities was too widespread to dismiss today as oversentimentalization of the "noble savage." The founders acted on what they believed they saw (and expressed in their writings), not on what a 20th century scholar might think of their era. Roger Williams used the Indian example to support his case for tolerance of religious minorities as far back as 1640. The image of the Indian was woven into the Enlightenment that shaped the new republic.

The colonists who shaped the new United States recognized the native contributions to their formative society. During August of 1775 -- shortly after skirmishes at Lexington and Concord, less than a year before Jefferson composed the Declaration of Independence -- delegates from the "Thirteen Fires" met with leaders of the Six Nations at Philadelphia in an attempt to procure their alliance (or at least neutrality) in the coming revolutiuon against British rule. During that conference, colonnial commissioners told the assembled Iroquois:

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"Our business with you, besides rekindling the ancient council-fire, and renewing the covenant, and brightening up every link of the chain is, in the first place, to inform you of the advice that was given about thirty years ago, by your wise forefathers, in a great council which was held at Lancaster, in Pennsylvania, when Canassatego spoke to us, the white people, in these very words..." The commissioners then repeated, nearly verbatim, Canassatego's words at Lancaster as Franklin had published them. They then continued:

"These were the words of Canassatego. Brothers, our forefathers rejoiced to hear Canassatego speak these words. They sunk deep into our hearts. The advice was good. It was kind. They said to one another: 'The Six Nations are a wise people. Let us hearken to them, and take their counsel, and teach our children to follow it...These provinces have lighted a great council fire at Philadelphia, and sent sixty-five counsellors to speak and act in the name of the whole, and to consult for the common good of the people..."

Franklin, Jefferson and others often used the Indian example as a counterpoint to what they regarded as a tyrannical and corrupt Europe. Franklin, in Europe, was called "philosopher as savage;" Jefferson called himself "a savage from the mountains of America." Both saw egalitarianism among the Indians as opposed to European society of "hammer over anvil" and "wolves over sheep." Franklin put it this way in 1770:

(9)

"The Care and Labour of providing for Artificial and Fashionable Wants, the sight of so many rich wallowing in Superflous Plenty, whereby so many are kept poor and distressed for Want, the Insolence of Office...and restraints of Custom, all contrive to disgust them [Indians] with what we call civil Society."

The example of American Indian societies provided Franklin, Jefferson, and others with a counterpoint by which to judge the societies which had sent their ancestors to America seeking refuge and freedom. Time and again, Franklin contrasted Indian practices to European customs in his writings. "All their government is by Counsel of the Sages," Franklin wrote. "There is no Force; there are no Prisons, no officers to compel Obediance, or inflict Punishment." Jefferson also remarked similarly on the degree to which American Indian societies operated on public opinion, with little of the coercion that so scarred American memory of European monarchies.

In his Notes on Virginia, Jefferson wrote that native Americans had not "submitted themselves to any laws, any coercive power and shadow of government. The only controls are their manners, and the moral sense of right and wrong...An offence against these is punished by contempt, by exclusion from society or, where the cause is serious, as that of murder, by the individuals whom it concerns."

(10)

The American Indian conception of liberty is so deeply rooted in our way of life that we sometimres fail to recognize it. Others much more expert in law than I am will adress this panel, but let me suggest one legal connection: In 1963, the United States Supreme Court held (in New York Times versus Sullivan) that public officials cannot successfully sue for libel unless they are subjects of "actual malice:" that is, unless the speaker knew his or her words were false before uttering them. The Court, in a way, was telling our public officials what the Great Law of Peace told Iroquois leaders many centuries ago: "Your skins shall be seven spans thick" when facing public questioning.

Now, no one can argue that the Iroquois made the Supreme Court do this in a blow-by-blow fashion. We are dealing with an idea here: an attitude toward public officials, freedome of expression, and liberty. Anyone who looks at the evolution of ideas in our society today cannot help but note how much closer we stand to the ideas stated in the Great Law than anyone in the Europe of 1776 or 1787 may have imagined. Read how the Iroquois respected women's rights. Read how their government forbade slavery. Read how seriously they took their liberties -- and then read our own history. We struggle every day toward a "more perfect union," and, in so doing, we find the Iroquois example, and that of other American Indian confederacies, providing an

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historical example -- not the only one, to be sure, but a very important light.

I am not about to suggest that we junk references to the Magna Charta, the Roman Republic, or the Greeks in our remembrance of national history -- just that we complete the picture by including an indigenous, American aspect in our celebrations. If history is to be an honest record of our past, and not just a confirmation of existing prejudices, we must complete the picture. Let us hope that schoolchildren of the future will learn the essence of the intellectual debts we owe not only to Europe, but to America, and its peoples. They helped make us what we are.

Bruce E. Johansen, associate professor of communication at the University of Nebraska at Omaha, is the author of Forgotten Founders: How the American Indian Helped Shape Democracy, re-issued in 1987 by Harvard Common Press, 535 Albany Street, Boston, MA 02118.

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SELECTED FACTUAL DATA
COMPILED BY PROFESSOR DONALD A. GRINDE (11/21/87)
ON:

Iroquois (Six Nation) Political Theory and the U.S. Constitution

"I have been more in the way of learning the sentiments of the Six Nations than of any of the other tribes of Indians..."
George Washington, September 7, 1783 in Saul K. Padover, ed., The Washington Papers (1955), p. 352.

"...the citizens ... were ... animated with the hope of transmitting to posterity the spirit of a free constitution in its native purity..."
[Statement made May 31, 1790 by Washington]. John C. Fitzpatrick, ed., The Writings of George Washington (1931-1944), Vol. 31, p. 67.

A. SYMBOLOGY OF THE IROQUOIS IN AMERICAN HISTORY

1. IROQUOIS GREAT TREE OF PEACE (symbol of the Iroquois government and constitution)

2. ONE ARROW - BUNDLE OF ARROWS (image of strength and unity)

3. THE IROQUOIS COVENANT CHAIN (extending the Tree of Peace and alliance system to new areas)

4. GRAND COUNCIL FIRE (symbol of Iroquois government in session)

5. THE CONSTITUTIONAL SONS OF ST. TAMMANY (a political organization of Non-Indians that dressed up as Indians and used Iroquois ideas and images during the 1770s, 1780s & 1790s)

B. EXAMPLES OF AMERICAN INDIAN AND WHITE AWARENESS OF THE IMPACT OF IROQUOIS IDEAS ON THE U.S. CONSTITUTION

"We, the Indian people, may be the only citizens of this nation who really understand your form of government, and respect that form of government, as this form of government was copied from the Iroquois Confederacy."
"Native Women Send Message," Wassaja, IV, 8 (August, 1976), p. 7.

[At Albany, New York, Benjamin Franklin] "...proposed a plan for the union of the colonies and he found his materials in the great confederacy of the Iroquois ... Here indeed was an example worthy of copying."
Julian P. Boyd, "Dr. Franklin: Friend of the Indians," in Roy N. Lokken, ed., Meet Dr. Franklin (1981), pp. 239 & 246.

"The Albany Plan is a landmark on the rough road that was to lead through the First Continental Congresses and the Articles of Confederation to the Constitution of 1787."
Clinton Rossiter, "The Political Theory of Benjamin Franklin," in Esmond Wright, ed., Benjamin Franklin: A Profile (1970), pp. 179-180.

C. EXAMPLES OF IROQUOIS SYMBOLOGY IN AMERICAN HISTORY

Even before the American Revolution, the Constitutional Sons of St. Tammany (urban middle class tradesmen and professionals), talked of uniting "... in their hearty endeavors to preserve their native Constitutional American Liberties."
Pennsylvania Chronicle, May 4, 1772.

Charles Thomson, Secretary to Congress (1774-1789) was adopted into the Delaware tribe in 1756. He was called "Wegh-wu-law-mo-end" or "the man who tells the truth." Much of the imagery and language of Native Americans interacting with the Founding Fathers in the Journals of the Continental Congress can be attributed to Thomson's understanding and interest in such matters.
John F. Watson, Annals of Philadelphia and Pennsylvania ... (1857), I, p. 570.

[The advise of the Iroquois on unity in 1744 sank] "... deep into [American] hearts, the advise was good, it was kind. They said to one another, the Six Nations are a wise people, let us hearken to their council and teach our children to follow it. Our old men have done so. They have frequently taken a single arrow and said, children, see how easy it is broken, then they have tied twelve together with strong cords--And our strongest men could not break them--See said they--this is what the Six Nations mean. Divided a single man may destroy you--United, you are a match for the world."

[The American people have] "...lighted a Great Council Fire at Philadelphia and ... we desire to sit under the same Tree of Peace with you ... and has God has put it into our hearts to love the Six Nations and their allies we now make the chain of friendship so that nothing ... can ... break it."

[The Continental Congress desires that] "... this our good talk remain at Onondago your Central council House. That you may hand down to the latest posterity these testimonials of the brotherly sentiments of the twelve United Colonies towards their brethren of the Six Nations and their allies." (At this conference, the Americans invited the Iroquois to come to Philadelphia; the Iroquois stated this "... shall be done.")

"Proceedings of the Commissioners Appointed By the Continental Congress to Negotiate a Treaty with the Six Nations, 1775," *Papers of the Continental Congress, 1774-1789*. National Archives (M247, Roll 144, Item No. 134).

In May and June of 1776, the Iroquois arrived in Philadelphia to meet with the Continental Congress. On June 11 (shortly after the Independence resolution was introduced and a revised plan of Franklin's *Albany Plan of Union* was introduced as a model for the government), the Iroquois chiefs were ushered into Independence Hall. a speech was delivered to the Iroquois calling them "Brothers..." and declaring that the American people and the Iroquois be "...as one people, and have but one heart." At the conclusion of this speech, an Onondaga chief rose and asked that the President of the Continental Congress (John Hancock) be given an Indian name. The Congress graciously consented and the chief gave the "...president the name of Karanduawn, or the Great Tree..."

Worthington C. Ford, ed., *Journals of the Continental Congress*, V, p. 430.

After the Declaration of Independence, James Wilson argued forcefully in the Continental Congress on July 26, 1776 that "Indians know the striking benefits of Confederation..." and they "...have an example of it in the union of the Six Nations." Referring to the Albany Conference of 1775, Wilson stated that the "...idea of the union of the colonies struck [the Iroquois] forcibly last year."

Ford, ed., *Journals of Congress*, VI, p. 1078.

On May 2, 1785, George Washington attended a meeting of the Constitutional Sons of St. Tammany in Richmond, Virginia (probably with the Governor of Virginia, Patrick Henry).

Donald Jackson and Dorothy Twohig, eds., *The Diaries of George Washington*, IV, p. 132.

In April of 1786 in Philadelphia, the Seneca Chief Cornplanter addressed the Constitutional Sons of St. Tammany (the Tammany sachems dressed in full Indian regalia): "This great gathering of our brothers is to commemorate the memory of our great-grand-father [Tammany]. ... You know that your and our grandfathers loved one another and strongly recommended to their children to live in union and friendship ... I also wish ... us all united as one man, and it may be my happiness to have it so. Let us keep fast the chain of friendship ... and ... we shall have nothing to fear from the great kings ... Brothers if we can effect this to become brothers to be united as one man there is no people that shall think evil of us ... I heard it said that our great-grand-fathers are dead. They are not dead. They now look down on us and know what we are doing."

After this speech, the Tammany sachem stated to Cornplanter: "We meet as brothers ... to remember our great-grand-father Tammany, and ... we buried the hatchert in a deep hole ... you will see great trees growing over it under which we wish our children to sit. We kindled a fire here ... and there are twelve other fires. But there is a greater fire than all of them. We are glad you are going to that great fire ... God sent you. He loves peace and friendship. We love you because you are from the the great-grand-father, and we shall never forget that you visited our wigwam."

[Philadelphia] *Independent Gazetteer*, April 22, 1786. (George Washington was so impressed by the Philadelphia Tammany Society's greeting of Cornplanter that he asked the New York City Tammany Society to welcome the Great Creek Chief, Alexander M'Gillvray, and the entire Creek delegation to New York in 1790).

After addressing the people of Philadelphia, Cornplanter and the Seneca sachems travelled to New York City to address the Congress, there he expressed his concern about the unity of the American people before a session of Congress.

"Brothers of the Thirteen Fires, I am glad to see you. It gives me pleasure to see you meedt in Council to consult about public affairs. May the Great Spirit above direct you in such measures as are good. I wish to put the chunks together to make the Thirteen Fires burn brighter."

Virginia Gazette, May 24, 1786.

[During the Constitutional Convention, Franklin used Iroquois terminology in describing the American government in writing the following words:] "I am sorry that the Great Council Fire of our Nation is not now burning, so that they cannot do your business there. In a few months, the coals will be rak'd out of the ashes and will be rekindled."

Benjamin Franklin to Cornstalk, the Cherokee Chief, June 30, 1787. Benjamin Franklin Papers, Manuscript Division, Library of Congress.

In August of 1787 while the first draft of the Constitution was being formulated, a Philadelphia publication printed this admonition (probably at the urging of the Tammany society) referring to Section 57 of the Great Law of the Iroquois:

"Unanimity recommended to Americans - A Fable - Addressed to the Federal Convention

A careful father, of old, who found
Death coming, call'd his sons around.
They heard with reverence what he spake.
Here, try this bunch of sticks to break

They took the bundle: ev'ry swain
Endeavour'd but the task was vain.

'Observe,' the dying father cry'd;
And took the sticks himself and try'd;

When separated, lo! How quick
He breaks asunder ev'ry stick
'Learn my dear boys, by this example,
so strong, so pertinent, so ample,

That UNION saves us all from ruin,
But to divide is your undoing:

For if you take them one by one,
see, with what ease the task is done!
Singly, how quickly broke in twain,
How form the aggregate Thirteen!'

Is not the tale, Columbians, clear?
What application needs there here?
This motto to your hearts apply,
Ye senators, - UNITE, OR DIE."

The American Museum: Or Repository of Ancient and Modern Fugitive Pieces, &c Prose and Poetical, II (August, 1787), p. 201 (Copy in the American Philosophical Society in Philadelphia, PA).

[In November of 1787 at the Pennsylvania Ratification Convention, James Wilson (one of the co-authors of the first draft of the Constitution) explained that "... the most important obstacle to the proceedings of the Federal Convention..." was in drawing the "...line between the National and the individual governments of the states." However, Wilson stated that the sentiments of the convention and of the people of America was "...expressed in the motto some of them..." have adopted "...UNITE OR DIE."

Max Farrand, ed., Records of the Federal Convention of 1787, III, p. 551.

Wilson also explained territorial expansion in the language of the Iroquois Covenant Chain. He stated in order to gain the respect of Western settlers, new government officers should be "... chosen by the people to fill the places of greatest trust and importance in the country; and by this means, a Chain of Communication and confidence will be formed between the United states and the new settlements.

To preserve and strengthen this chain it will , I apprehend, be expedient for Congress to appoint a minister for the new settlements and Indian Affairs."

"...of a New Plan concerning the new states," James Wilson Papers, Vol. 2, p. 132 in Historical Society of Pennsylvania, Manuscript Division

In Federalist No. 69, Alexander Hamilton addressed the criticisms of the Tammany society about excessive executive powers in the new constitution. He referred to a letter written under the pseudonym, Tamony, that appeared in Pennsylvania and Virginia newspapers. Tamony said that the president "... will possess more supreme power, than Great Britain allows her hereditary monarchs..."

Harold C. Styrett, ed., The Papers of Alexander Hamilton, IV, pp. 593-594.

In 1790, the Constitutional Sons of St. Tammany referred to the U. S. Constitution as a "...a tree of peace [to] shelter us with its branches of union..." at a banquet that Thomas Jefferson (Secretary of State) and John Jay (Chief Justice of the Supreme Court) attended.

New York Journal, August 3 & 10, 1790.

D. HISTORICAL RECOGNITION BY POLITICAL FIGURES

"The six nations were confederated in a ... republic upon the unique plan afterward adopted by our states and our national republic."

Eliot Danforth, Former New York State Treasurer, "Indians of New York," Utica Morning Herald, May 9, 1894.

"...it is out of a rich Indian democratic tradition that the distinctive political ideals of American life emerged. Universal suffrage for women as for men, the pattern of states that we call federalism, the habit of treating chiefs as servants of the people instead of their masters, the insistence that the community must respect the diversity of men and the diversity of their dreams--all these things were part of the American way of life before Columbus landed."

Felix Cohen, Associate Solicitor, Interior Department (Law Professor, CUNY and Yale University), "Americanizing the White Man," The American Scholar, XXI, 2 (spring, 1952), pp.179-180.

"To acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution

Whereas the original framers of the Constitution, including most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts, principles and governmental practices of the Six Nations of the Iroquois Confederacy; and

Whereas the confederation of the original Thirteen Colonies into one republic was explicitly modeled upon the Iroquois confederacy as were many of the democratic principles which were incorporated into the Constitution itself..."

Bill introduced in the 100th Congress, 1st Session, Senate Concurrent Resolution No. 76 (Senator Daniel K. Inouye, Democrat-Hawaii, sponsor)

Prepared Statement of Arthur Gahbow, Chief Executive, Mille Lacs Band of Chippewa Indians

As Chief Executive of the Non-removable Mille Lacs Band of Chippewa Indians, I am devoted to the inherent right of bands, tribes and individuals to resolve disputes in tribal court.

The Mille Lacs Reservation is located in Central Minnesota. Over six years ago we decided to adopt a separation of power form of government. Our government features an Executive, Legislative and a Judicial Branch.

There is a fair and equitable system of checks and balances among the three branches. As Chief Executive, I am responsible for the execution of our laws. The Band assembly is the Legislative Branch of our government; all appropriations originate in the Band Assembly and all laws are written by the Assembly.

Finally, the Judicial Branch is responsible for the interpretation of our laws and the adjudication of disputes.

Each Branch is dependent upon the other two and our government cannot operate properly if the powers of any Branch are diminished.

Therefore, any attack upon the Judicial Branch is an attack upon our government as a whole. Any attack upon our government is an attack upon our sovereignty. Sovereignty is our right and ability to control our own destiny. We existed as a sovereign nation prior to the existence of the United States and we retain and vigorously defend our sovereign status.

As a sovereign nation, we have the inherent right to be self-governing. The Supreme Court has consistently upheld our right to have a court system, and operate under our own system of laws.

the Band Court's obligation to appoint counsel for indigent defendants. This was not an ICRA requirement.

The Mille Lacs Band feels strongly that the ICRA remedied the problems Tribal Courts were having and that any additional legislation would infringe on the Bands right to be self-governing.

Again, the Supreme Court upheld the right of Indian Tribes to adjudicate disputes in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). That case interpreted the ICRA as meaning that when a tribe violates a person's rights, that person can seek Federal review only if he is being detained. This is in accordance with Section 1303 of the Act which states:

> "The privilege of the right of harbeas corpus shall be available to any person, in a Court of the United States, to test the legality of his detention by order of an Indian tribe,"

Hence, the intent of Congress, as interpreted by the Supreme Court, was to only get involved in the decisions of Indian courts if someone is wrongfully jailed.

Any amendments to the ICRA would be a disservice to Indian tribes. In 1968, Congress achieved two goals by passing the ICRA. First, it imposed upon the tribes parameters for their court systems. Second, it guaranteed the right of tribal courts to exist into perpetuity.

In 1832, the Supreme Court recognized that Indian tribes are independent political communities which retain their natural rights in matters of self-government. Worcester vs. Georgia, 31 U.S. 515 (1832)

In 1896, the Supreme Court held that the United States Constitution does not apply to internal tribal matters. Talton v. Mayes, 136 U.S. 376 (1896).

Beginning in 1962, Congress began holding hearings about abuses of discretion in tribal courts.

To remedy these abuses, Congress passed the Indian Civil Rights Act in 1968 (Title 24, USC, Sections 1301-41). This Act guaranteed tribal court litigants most of the rights guaranteed in the first ten amendments to the U.S. Constitution. Among the civil rights which were conferred by the ICRA are the rights of free speech, press and assembly; protections against unreasonable searches and seizures; the right to a speedy trial; the right to hire a lawyer in criminal cases; protections against self-incrimination and cruel and inhuman punishment; and the rights to equal protection and due process of law. (At Section 1302)

All of these rights are provided for in the Band Code of the Mille Lacs Chippewa. Most of the guarantees are found in Chapter 5 of our Code which deals exclusively with civil rights. In addition, the Mille Lacs Band Code contains civil rights provisions which were not required under the ICRA. One example is

It is the position of the Mille Lacs Band that any compromise of these two initial goals would be an aggregious error by Congress. The ICRA struck a nice balance. Congress got its civil rights laws into tribal courts. The tribes got the right to permanently operate their Court systems.

Should Congress impose more civil rights laws upon tribal courts, it will be infringing on the tribal right to self-government which is the cornerstone of Federal-Tribal relations. Should Congress attempt to eliminate tribal courts, it will have broken a promise to the Indians.

It was our impression that breaking promises to Indians was out of fashion in this Century.

As a people, we have different folkways and mores from the predominant white society. Consequently, we have cultural and traditional matters which can only be heard in our court system. No other tribunal in the world can make decisions which interpret our ancient laws and age old traditions.

We believe that mankind constantly searches for truth. We as a people need some tribunal in our midst to seek truth. If you remove a court from a community, you remove the community's ability to ferret out truth and purge itself.

We also believe that mankind seeks justice. We enjoy the right to dispense justice. Many of our Band members, don't believe justice is possible in the white man's court. We believe our Band Court satisfies a need for justice among our people.

Therefore, the Mille Lacs Band Court is in complete compliance with the ICRA, and the Court is a fundamental element of our government as well as our best forum for seeking truth and justice.

Further legislation is not needed and we will oppose any further restrictions on our court system and our right to be self-governing.

CROW TRIBAL COUNCIL

P.O. Box 159
Crow Agency, MT 59022

RICHARD REAL BIRD, Chairman
JEROME HUGS, Vice Chairman
TRUMAN C. JEFFERSON, Secretary
CARLTON NOMEE, SR., Vice Secretary

Crow Country

December 15, 1987

The Honorable Daniel K. Inouye
Chairman
Select Committee On Indian Affairs
SH-838 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

On behalf of the Crow Tribal Council, Crow Agency, Montana, I would like to express my deep appreciation to the members of the Select Committee On Indian Affairs, including yourself, for the opportunity to present the following written testimony with regard to **S. Con. Res. 76**, " To Acknowledge the contribution Of The Iroquois Confederacy Nations to the Constitution and reaffirm the government-to-government relationship between Indian tribes and the United States."

The Crow Tribe of Indians of Montana signed three major treaties with the United States, including: (1) the Treaty of 1825; (2) the Treaty of 1851; and, (3) the Treaty of 1968. These three treaties form the cornerstone of the relationship between the Crow Tribe and the United States.

Our Tribe has always maintained a peaceful and friendly relationship with the United States, and takes pride in the fact that we have fought side-by-side with our fellow U.S. Citizens in all of the major wars and conflicts of this century.

However, we note that since our first treaty in 1825, the Crow Tribe has consistently paid an extremely high price for the maintenance of this relationship. For instance, while the Treaties of 1851-1868 provided that approximately 38.5 million acres of land were to be reserved by the Tribe for our Reservation, in 1987 we find that only approximately 2.5 million acres remain in tribal or individual Indian ownership. Therefore, we have relinquished approximately 36 million acres of land since 1851.

During this same period of time we have seen our tribal headquarters relocated from Livingstone, Montana, 180 miles west of our present location, to Absarokee, Montana, about 100 west, then to Crow Agency, Montana, where we reside today.

In 1981, in the decision by the U.S. Supreme Court in Montana v. United States, we witnessed with deep sorrow, the loss of the bed of our sacred Big Horn River, which bisects the Crow Reservation.

At this writing, the percentage of non-Indian land ownership on the Crow Reservation is estimated to be 45%. It is apparent that the Crow Tribe is very close to becoming a minority land owner on our own reservation. The Committee should be aware that according to a recent "Audit Report", prepared by the Office Of Inspector General, U.S. Department of the Interior, issued on March 3, 1986, and entitled, Purchases of Crow Indian Reservation Lands, 285,000 acres of non-Indian-owned land may be in direct violation of The Crow Allotment Act of 1920, 41 Stat. 751, Section 2. The Audit Report states in part, ". . . The literal interpretation of Section 2 of the Act means that no individual, company, or corporation can buy more than an aggregate of 1,280 acres of agricultural land, or 1,920 acres of grazing land . . ." on the Crow Reservation.

The scenario identified above is but one example of the absolute necessity that the Congress of the United States, via S. Con. Res. 76 clarify the status of the Crow Tribe in relation to the United States. In this regard, I would like to offer the following recommendation.

Recommendation #1: The Crow Tribe strongly supports the enactment of S. Con. Res. 76, "To Acknowledge the contribution of the Iroquois Confederacy Nations to the Constitution and reaffirm the government-to-government relationship between Indian tribes and United States."

Respectfully submitted,

Richard Real Bird

Mr. Richard Real Bird
Chairman

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December 16, 1987

The Honorable Daniel K. Inouye, Chairman
Senate Select Committee on Indian Affairs
838 Hart Office Building
Washington, D.C. 20510

Dear Chairman Inouye:

I am pleased to have this opportunity to comment in support of S. Con. Res. 76, and request that this letter be included in the record of the December 2, 1987 hearing on that resolution. As you know, it represents the first step forward in fashioning an Indian affairs policy for America which is based upon fair play and honor, and serves as a reminder of the sacred democratic principles by which we govern.

Enactment of the resolution is vital to many of my constituents in Minnesota. As you know, many Minnesotans, especially the Honorable Roger Jourdain, Chairman of the Red Lake Band of Chippewa Indians, have been working to see this resolution and other positive measures enacted. The Red Lake Band is an important part of the economic, cultural and social fabric of Minnesota and the nation. What the Red Lake Band seeks, Minnesota needs: a far better future for Red Lake members and restored, government-to-government relations between the Red Lake Band and the United States government.

I support the S. Con. Res. 76 for several reasons. First, it acknowledges the unique contributions of the various Indian Tribes to the democratic ideas, form of government, and philosophical wisdom that strongly influenced the framers of the United States Constitution and our American understandings of law, democracy and justice. In this bicentennial celebration of the drafting and ratification of the Constitution, it is only fitting that we remind ourselves and the American people of the immense intellectual debt we owe Indian people. We really need to get the kind of information you have gathered at these hearings disseminated to the general public and into our children's history books.

THIS STATIONERY PRINTED ON PAPER MADE WITH RECYCLED FIBERS

The second reason that draws me to support this Resolution is the need for those of us in Congress to begin a partnership with Indian Tribes to restore relations between Indian Tribes and the United States -- a relationship that should be strong, historically and legally consistent, and government-to-government. This resolution opens the door for a reformulation of our Indian policies so that they respect and honor the obligations of the United States to Indian Tribes. I seek a renewed policy foundation which is marked by good faith, integrity and basic justice, distinguishing the relations with the Indian peoples of our land from the termination and assimilation Indian policies being followed by many other nations.

Third, I believe it is vital that focus be placed on the foundational issues that give rise to the specific problems that chronically plague Indian Tribes. Otherwise the problems will be repeated in an endless cycle.

My constituents are weary of dealing with what they consider a deteriorating situation at the Bureau of Indian Affairs (BIA). They are tired of a paternalistic attitude of domination and control. This is not the kind of role we want the United States government to have in dealing with Indian Tribes in Minnesota. The recent newspaper accounts of fraud in Indian Country have made crystal clear what the Tribes have been saying for years: United States agencies dealing with Indian affairs have not performed their task. This disgraces our nation.

I join with you, Mr. Chairman, in aspiring to eliminate arbitrary, unilateral decision-making in Indian affairs by our Federal government. I have become persuaded that the only way for Indian Tribes to experience real self-determination, is to restore the unique, constitutionally recognized relationship between the United States and Indian Tribes. S. Con. Res. 76 begins this task.

A fundamental reorganization of the Federal bureaucracy, perhaps even an independent Indian agency, may be in order. The conflict of interest problem that is inherent in the trust responsibility of the United States must be resolved or Indians will continue to get the short end of the stick in each and every policy conflict. It is my hope that consideration and enactment of S. Con. Res. 76 will set off a sweeping review of Indian policies culminating in a pragmatic restoration of nation-to-nation relations between Indian Tribes and the United States. I intend to do my part in the House.

In conclusion, I wish to commend and thank you, Mr. Chairman, and the other Members of the Select Committee on Indian Affairs who have exercised leadership in this area. I hope your Committee will see fit to hold field hearings on S. Con. Res. 76 in Minnesota so that the issue can be raised more dramatically and in the reservation context.

Sincerely,

Gerry Sikorski

GERRY SIKORSKI
Member of Congress